

A
FAIR TRIAL
OF THE
IMPORTANT QUESTION,
OR THE
RIGHTS of ELECTION
ASSERTED;
AGAINST THE
DOCTRINE of INCAPACITY by EXPULSION,
or by RESOLUTION:

UPON
True Constitutional PRINCIPLES, the Real LAW of PARLI-
AMENT, the COMMON RIGHT of the SUBJECT, and the
DETERMINATIONS of the HOUSE of COMMONS.

IN WHICH,
TWO PAMPHLETS, entitled, *The Case of the late Middlesex
Election, Considered, &c.*—And, *Serious Considerations upon a
late Important Determination*, are very fully examined and
answered.

WITH
SOME OCCASIONAL STRICTURES.

*Erga Civitatem ac Cives optime ille se gerit, qui omni Victoriæ
quæ in Olympicis, aliisque tam Belli quam Pacis certaminibus
comparatur, illam Gloriam anteponit, quam PATRIIS LEGIBUS
ministrando nanciscitur, atque in hoc Ministerio cæteris omnibus
per totam vitam præstare conabitur.*

PLAT. DE LEG.

L O N D O N:

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MDCCLXIX.

FAIR TRIAL OF THE IMPORTANT QUESTION OF THE RIGHTS OF THE ACCUSED

IN CONNECTION WITH THE
PROSECUTION OF THE CASE OF
THE LATE MR. JAMES
MURPHY

THE CONFIDENTIAL DOCUMENTS
AND THE EVIDENCE
IN THE CASE OF THE LATE
MR. JAMES MURPHY



THE CONFIDENTIAL DOCUMENTS
AND THE EVIDENCE
IN THE CASE OF THE LATE
MR. JAMES MURPHY

SOME OCCASIONAL STATISTICS
AND OTHER INFORMATION
RELATIVE TO THE
CASE OF THE LATE
MR. JAMES MURPHY

LONDON:
Printed for J. Ashby, at the
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A

F A I R T R I A L

O F T H E

I M P O R T A N T Q U E S T I O N , &c.

IF the people of *England* shall ever come to be in so benumbed a state, as not to feel, and to shew they feel, any real invasion of their essential rights and privileges, the body politic must then be far advanced in a general mortification, that can end in nothing less than the death of Liberty. An indifference, even to the great concerns of freedom, would be but a bad symptom in a free state; and rather argue, that the constitution was not in it's natural soundness and vigour. Liberty and power are naturally as jealous of one another, as any two states can be of their several encroachments. They ought not, however, to part for small bickerings, but should bear little jealousies without breaking for them.

That the liberties of this country are not yet arrived at the most dangerous stage of a decay, late occurrences have sufficiently proved: And amongst the signs of the national sense of the value and importance of great constitutional rights, may be numbered two laboured publications, in

B

defence

defence of the late determination in the case of the election of Middlesex; the professed design of both which is, to prevent the public from being misled by those who have an interest to impose upon them, and to guard them against false representations, and alarms of vain apprehensions.

The authors of these two performances have acquainted us with their motives for sending into the world their thoughts upon the weighty subject they have handled. But there was no occasion for an apology. The subject is worthy of any pen; and those gentlemen had a right to support an opinion, which, very probably, they had given in a situation of great responsibility.

A question that could so divide the wisdom of the nation, and that now engages the body of the people, is not a light matter. The protestation of almost all the representatives of the landed interest, upon a point respecting the rights of election, deserves very serious attention. These are the vital parts of the constitution: If her cry is, *Omnes jurant me Jovis esse filium, sed vulnus hoc mortalem esse me clamat*; she ought to be heard, and her wounds healed.

The liberties of this country owe much to the parliamentary discussions and remonstrances, on great and fundamental points, controverted in former days, when the dispute was between the prince and the people, between the pretended prerogative of the crown, and the just rights of the subject.

Explanations of that sort cannot in these days be repeated. The Revolution has taught the dullest apprehension the folly of such unnatural struggles. If our liberties suffer now, we must be the executioners ourselves. 'Tis therefore but fit to warn one another of the danger to which the commonwealth may be exposed, whether by the misconduct

conduct, or the misapprehension of momentous measures in the state. So far the Author of the *Case* had reason to say, he performed the duty of a good citizen, when on this occasion, he submitted to the judgment of the public, those reasons and authorities which had brought conviction to his own mind.

After his example, I propose to consider what he and the writer of the *Serious Considerations* have favoured us with; and, in doing it, I shall follow the Author of the *Case*, because in that way, hardly any thing can be missed that is material to be observed upon the *Considerations*.

In general, the *Case* appears to me to favour much of that bias, which men of the law have been said to have to their calling in the interpretations they make of the law. That sort of art seems to have been used, which able men in the profession, successfully employ to divert the attention from the essence of a difficult cause, by speaking to points very capable of being well supported, but which have no real influence upon the merits of the question under trial. This observation will justify itself in the sequel, in which, for the sake of perspicuity, and to be more distinct, I propose to prosecute the following method:

I. In the first place, I shall take a general survey of the whole argument of the Author of the *Case*, and point out what I apprehend to be a certain kind of confusion, and some particular fallacies that run through it; by which the Author's reasoning may mislead, but cannot, on it's own plan, be otherwise than very deficient and inconclusive.

II. Secondly, I shall more directly and precisely shew what is *not* the question; which will, in effect,

effect, only be to shew what the Author substitutes in room of it.

III. Thirdly, I shall state what the real question is; and, for preventing all ambiguity, shall explain the terms necessary to the understanding of it.

IV. Fourthly, I shall lay down what I apprehend to be the principles and grounds, upon which the question ought to be tried.

V. Fifthly, I shall endeavour to examine the question as stated and explained upon those grounds and principles.

VI. And lastly, I shall bestow a few words, to point out the real importance of the question, and the danger of the proposition, which I hope, in the argument, to prove to be erroneous.

The first thing proposed was to take a general survey of the whole argument of the Author of the *Case*, and to point out what I apprehend to be a certain kind of confusion, and some particular fallacies that run through it, by which the Author's reasoning may mislead, but cannot, on its own plan, be otherwise than very deficient and inconclusive.

Here I must content myself with some detached observations, and

First, I observe that the professed purpose of our Author is to vindicate from misapprehension and misrepresentation the late determination of the House of Commons: And "to this end he proposes (pages 2 § 3) "to shew from the "Records of Parliament, and the Authorities of "Law, that the House of Commons is legally invested with the power they have exercised, with "respect to the late determination of the Election "for *Middlesex*."

"Farther,

“ Farther, that on the general principles of
 “ reason and constitutional policy, they ought to
 “ have such a power: And that, in the instance in
 “ question, they have exercised their power in a
 “ just and constitutional manner, not only accord-
 “ ing to the Law and Usage of Parliament, but in
 “ strict conformity with the adjudications in the
 “ courts of *Westminster* on similar occasions.”

If, by the first part, our Author means no more than what he afterwards (at the top of p. 7) undertakes to show, not only from “ the authorities
 “ of the most antient and respectable lawyers, but
 “ from the Records of Parliament, that the House
 “ of Commons have first, the sole and exclusive
 “ power of punishing their own members as such,
 “ either by commitment, expulsion or otherwise;
 “ and secondly, the sole and exclusive power of
 “ examining and determining the rights and qua-
 “ lifications of electors and elected, together with
 “ the returns of writs for the election of Mem-
 “ bers; and, in short, all matters incidental to
 “ such elections:” I say, if our Author means no more than this, there may be a consistency in his argument: And all that can be said, is, that the Author is at immense labour to prove two propositions which I shall not deny, even as laid down by himself. But if our Author means, by what he *proposes* in p. 2, that he is to show that the House of Commons legally are, and ought to be invested with a power, simply by a vote of their own, to make a Law of disability, by which a person shall not only be deprived of his *seat*, but disfranchised of his *eligibility*: I say, if our Author means this, he means a very different thing from that he first mentioned: though, perhaps, a thing more consonant to the professed end and design of his undertaking. And that this is what the author does mean and propose in p. 2, would appear from this
 very

very consideration, that nothing else is to his purpose.

However, it is evident, that what will prove the two points proposed to be proved in p. 7, will not prove what, in p. 2, is proposed to be shown, if thereby is meant what is last above supposed.

There is therefore here a downright confusion of terms, or rather of ideas. And if the reader is not more careful to attend to distinctions, than the Author has been to make them, he will in a mist of words, be carried away to a proof of propositions not controverted, instead of a proof of the sole point in dispute; for evincing which the other propositions are of no avail.

Secondly, I observe in farther confirmation of the alledged confusion of our Author's argument, that, after giving a detail of the proceedings in regard to Mr. *Wilkes*, which take up from the words above cited in p. 2, to the middle of p. 4, he there, by way of resuming the thread of his discourse, informs us, that "in order to show that
" the House of Commons is legally invested with
" the power they have exercised on this occasion,
" it will be necessary to explain the nature and
" extent of the powers constitutionally vested in
" that House;" from which it is plain, the only way to know what power our Author's argument tends to show the House of Commons to be invested with, is, by attending to his own account of the constitutional powers of the House. Accordingly, let it be observed in the

Third place, That all the account our Author gives us of the constitutional powers of the House of Commons, is this, "that jointly with the other
" two estates, they have a power of legislation, and
" that separately and independently they have a
" power of judicature;" and our Author tells us, (bottom of p. 6) "it will not be material on the
" present

“ present occasion, to enquire into the various subjects over which the jurisdiction of the House of Commons extends. It will be sufficient, with regard to the question now under consideration, to show (as above mentioned) that the House have the sole and exclusive power of punishing their own Members, and of examining and determining as to elections.” Hence nothing can be more evident than this, that if the power of judicature in the House of Commons, exercised in those two instances, is not sufficient to prove the House to be *legally invested with the power they have exercised with respect to the late determination of the Middlesex Election*, it is *not* proved.

A fourth observation to be made, respects the ambiguity with which our Author expresses himself as to the *Law of Parliament*, of which our Author makes a sovereign specifick that can dissolve the most sacred rights of the subject, if they are but thrown into his state crucible.

Our Author acquaints us (p. 4th, at the bottom) that, “ the rule, and only rule, by which the power of judicature (of the House of Commons) is directed, is the *Law of Parliament*, which is part of the *Law of the Land*.”

The pains taken to prove from Lord Coke, Lord Cowper, Holt, Hale, and other Judges, that there is a *Law of Parliament*, might have been spared. I agree that the *Lex & Consuetudo Parliamenti*, is part of the Law of the Land. What it means, shall hereafter be considered. Our Author intends to convey this idea, that the Law of Parliament is the only *norma judicandi* in the exercise of the judicature of the House of Commons; and, in p. 6. he teaches us, that “ the Law of Parliament, in matters thereby cognizable, is distinct from, and independent of all other Laws.” By which it is clear he intends, that the Law of Parliament is
the

the mere will of the House of Commons. For, at the bottom of p. 12, he says, " Let it be admitted for a while, that expulsion does not of itself create an incapacity of being re-elected; yet still it will appear, that the House of Commons not only as expositors of their own resolutions, but, as expositors of the *Common and Statute Law* of the Land, in cases where their jurisdiction is competent, have a right to declare, who are, and who are not eligible as Members of Parliament." " And that (he immediately adds) leads to the next proposition, which is, that they have the sole power of determining all matters incident to elections." Which proposition, though the only fountain from which the other doctrine is drawn, will just prove it as much as any proposition whatever, the most remote from the subject. And the whole resolves into this, that because the House of Commons are, as our Author calls them, the sole expositors of the Law, they may make the Law to be what they please. The doctrine is in the stile of the Law of the twelve Tables, *uti dixisset, ita jus esto*. But it is the reason of every Law, that no man's will, nor the will of any body of men, except in a legislative capacity, should be a Law, or should, in judicature, be a rule of judgment.

Our Author confounds the *power* with the *exercise* of judicature. But they are very distinct. The power of judicature is *jurisdiction*, or the right to judge. The exercise of judicature is the giving of judgment, or judicial acts. The Law of Parliament may be, and it is, the only rule by which the *jurisdiction*, or *power of judicature* of the House of Commons is *directed*, i. e. ruled, modelled, ascertained and established: but the Law of Parliament is *not* the only rule by which the *exercise of the judicature* of the House of Commons, mean-

ing their judgments or judicial acts, is directed. For the rule of judging will be different, *secundum subjectam materiam*. The very matter of elections, which is the *Peculiar* of the jurisdiction of the House of Commons, involves rights which must be judged of by the *common* and by the *statute* Law.

In the very passage of Lord Coke, which is our Author's own authority, the position is, that "all weighty matters in any Parliament concerning *the Peers of the Realm*, or Commons in Parliament assembled, ought to be determined, adjudged and discussed by the course of Parliament, and not by the civil Law, nor yet by the common Laws of this Realm." Now surely the succession or right to a Peerage, may be one of the weighty matters in Parliament moved concerning a *Peer of the Realm*, and it is so peculiar to the jurisdiction of the House of Lords, that no other Court can meddle with it; but the common Law of the Realm would be the rule of judicature in that case. And most certainly (to use Lord Coke's own words) "*a pari ratione*, the like is for the Commons, for any thing moved or done in the House of Commons."

Why then did our Author use ambiguous terms? Only because they could mislead, and clear expressions would have cut up the very foundation of his position. He would not plainly and directly say, the *Law of Parliament* was the *only rule* of the *exercise of the judicature* of the House of Commons. Common sense, assisted with a very little Law, was sufficient to reject the notion. Yet what he had not courage to say, must be *understood*, or his argument was of no strength. Therefore what could not be *avowed* was to be *couched*, and conveyed in a fog. For which reason he uses the ambiguous term, *power of judicature*.

'Tis not unworthy of a remark too, that the words quoted by our Author from Lord *Coke*, are not in that part of his Treatise where he explains the *Lex & Consuetudo Parliamenti*; but are taken from the article in which he professedly treats of the *judicature* of parliament. But our Author went so far forward in the Book to find out the *useful* words Power of Judicature, to join them with what Lord *Coke* had some leaves before delivered as to the Laws and Customs by which the Court of Parliament, in general, not the House of Commons in particular, *subsists*.

The inaccuracy of Lord *Coke's* diction, particularly in the word *directed*, is even made subservient to our Author's turn. But Lord *Coke* himself explains that word by the other *subsists*, which cannot possibly be applied to the exercise of judicature, or to any thing else but the *constitution* and *jurisdiction* of the Court of Parliament, i. e. of both Houses in their several capacities *. It was not

* The whole passage which our Author has mutilated, will make this very clear. "As every Court of Justice (says Lord *Coke*) hath Laws and Customs for its direction, some by the Common Law, some by the Civil and Canon Law, some by peculiar Laws and Customs, so the High Court of Parliament, *suis propriis legibus & consuetudinibus, subsistit* [it is *Lex & Consuetudo Parliamenti*] * that all weighty matters [in any Parliament,] moved concerning the Peers of the Realm, [or Commons in Parliament assembled,] ought to be determined and adjudged, and discussed by the Course of Parliament, and not by the Civil Law, nor yet by the Common Laws of this Realm [used in more inferior Courts, which was so declared to be *secundum legem & consuetudinem parliamenti*, concerning the Peers of the Realm, by the King, and all the Lords Spiritual and Temporal] and the like [pari ratione] is for the Commons, for any thing moved or done in the House of Commons; [and the rather, for that by the Law and Custom of Parliament, the King cannot take notice of any thing said or done in the House of Commons; and every Member of the House

* The words inclosed within the [] are those omitted by our Author.

not in the view of Lord *Coke* to define the rule of decision as to matters to be determined by the House of Commons, or to assert that the *Law of Parliament* was the only standard for the exercise of their judicature *, but merely to declare that the Parliament,

“ House of Parliament hath a judicial place and can be no witness.] And this is the reason that Judges ought not to give any opinion of a matter of Parliament, because it is not to be decided by the Common Laws, but *secundum legem & consuetudinem parliamenti*; and so the Judges in divers Parliaments have confessed; [and some hold that every offence committed in any Court, punishable by that Court, must be punished, proceeding criminally, in the same Court, or in some higher, and not in any inferior Court, and the Court of Parliament hath no higher.]”

Lord *Coke* here alludes only to the nature, subjects, peculiarities and exclusiveness of the jurisdiction of Parliament, and the particular mode of its proceeding by what is called the Course of Parliament. Its independency of the Crown, and its superiority to all other Courts, he chiefly has it in his eye to establish. What he says is applied equally to the House of Peers and the House of Commons, and to all matters of *legislation, of judicature, or of counsel*.

* Our Author, in a note, mentions as a proof that the Law of Parliament is the only rule of the judicature of the House of Commons, the record containing the answer given by the Judges, when consulted as to the release of some Members of the Commons, imprisoned while Parliament was not sitting, “ that it was not their part to judge of the Parliament which was Judge of the Law.” The Commons would not now put such a question in the reverence of the Judges, being merely a matter of privilege. But that the Judges did then, as they would now, give an opinion upon a Question of Law, when properly put to them, Lord *Coke* produces an instance, in the Parliament begun November 7, 1st. Henry the VII. “ on the first day of which it was resolved by all the Judges, as to all those that were attainted of treason, and returned Knights, Citizens, or Burgeses of Parliament, that the attainders were to be reversed by the authority of Parliament before they could sit in the House of Commons, and that after the attainders were reversed, both the Lords and those of the House of Commons might take their places, for such as were attainted could not be lawful Judges so long as their attainders stood in force: And thereupon the attainders were resolved by Act of Parliament, and then they took their places in Parliament.”

Parliament, like all other Courts, has its own laws and customs by which its power is constituted, and its proceedings regulated, and that what belongs to the jurisdiction of Parliament is not to be meddled with any where else, but there proceeded in according to parliamentary rules.

Our Author in some measure corrects himself, for, in p. 6, he says "it is by the Law of Parliament, and by this only, that the House of Commons *regulate their proceedings*, with respect to the various subjects of the jurisdiction they exercise." In the former position it was "the only rule by which the *power of judicature of the House of Commons* is directed." These two things are very distinct, and would appear so more, if it had been said, that by the Law of Parliament they regulate their *form* of proceedings, which is all that the words can naturally mean. But it was intended by this as well as the other mode of expression, imperceptibly to insinuate, that the House of Commons has no other rule by which to judge or determine in any cause, but the Law of Parliaments: And that our Author takes care to make such a rule as excellently suits his own purpose. For if he is dark and ambiguous in his *use* or application of the Law of Parliament, he is not more clear in the *definition* of it.

In p. 6, he says, "the Law of Parliament may be considered as composed of two branches, 1st. The rules, orders, customs, and course of the House, with their expositions of, and decisions upon the Law, with respect to matters within their jurisdiction." The second branch composing the Law of Parliament consists, (according to our Author) "of the Statute Law of the Realm, so far as the same regards the House of Commons, or the jurisdiction thereof."

The

That the *Rules, Orders, Customs, and Course* of the House, are the Law and Custom of Parliament, shall not be disputed: But what makes their *expositions of, and decisions upon the Law*, part of the Law of Parliament, I know not; unless it be our Author's own doctrine, that the House, "as expositors of their own resolutions, "and expositors of the common and statute Law, "have a right to declare, who are, and who are "not eligible as Members of Parliament."

The decisions of the House in matters of elections, were so little a Law to themselves, till an Act of Parliament made the *last determination* final, that the variation of them was a public reproach.

But our Author has a curious method of proving, that the decisions of the House of Commons are part of the Law of Parliament. "The customs," (says he) "course and common judicial proceedings of a Court, are the Law of the Court, of "which the common Law takes notice, without "allegding or pleading any usage or prescription "to warrant them."

The form of judicial proceedings may be, in some sense, the Law of a Court. But the decisions or determinations of a Court are not the Law of the Court, so much as they may be said to be the Law of the Land, if they are at all Law. And nobody, I believe, ever heard of notice being taken of a decision, as a Court takes notice of an Act of Parliament, which it is *pars judicis* to do. As to allegding or pleading an usage or prescription to warrant decisions, or to warrant the customs and course of a Court, it is hardly intelligible.

To clinch the matter however, our Author, in the next paragraph, says, "that the course of any "particular Court is a Law, and that the determinations of a Court make part of the Law of "the Land, has been held from the earliest times, "so

“ so far back even as the year Book of II. Edward.”

—In the former citation the judicial proceedings of a Court were the Law of the Court. Here, the thing really intended conveniently creeps out of its shell of ambiguity, and we are told in plain terms, the determinations of a Court make part of the Law of the Land. The confusion runs between the *Law of a Court*, and the *Law of the Land*; between *common judicial proceedings* which signify the form only of proceedings, and the *determinations of a Court*. The end of all which, is to make the decisions of the House of Commons the Law of Parliament, and consequently the Law of the Land, because the determinations of a Court, (says our Author) make part of the Law of the Land.

A *series rerum judicataram* in a limited sense may be considered as Law, because Courts are very cautious in departing from what is established by long practice; the Law in its humanity judging it better, in some cases, even to adhere to confirmed error, than to shake foundations upon which the people, trusting to the authority of decisions, have built. But no lawyer ever asserted, that determinations of a Court *absolutely*, and in the abstract, were Law: And if a year Book older than King *Alfred* had said so, it only spoke inadvertently. Very grey-hair'd determinations have yielded to principles, when they came to be farther examined and better understood. But of all determinations in the world, those of the House of Commons, in matters of election, in past times, had the least claim to this privilege, the fluctuation of which was a very taunt and a proverb, till an Act of Parliament interposed.

The position of our Author needed some confirmation, and he has given it in the following words.

“ Thus

“ Thus the Rules, Orders and Course of the
 “ House of Commons, with their expositions and
 “ decisions on matters cognizable before them,
 “ are as much the Law of the Land, as the Rules
 “ and Orders of the Court of King’s Bench with
 “ *their* determinations, are the Law of the Land.
 “ Nay, such proceedings and decisions of the
 “ House of Commons, are in truth more binding
 “ than those of the Courts at *Westminster*, because
 “ from the former there lies no appeal.”

The determinations of the Court of King’s Bench, or any other such Court, are Law in the sense which has been mentioned, and in that only. To their superiority in point of uniformity and consistency, we refer the comparison between them and the determinations of the House of Commons, before the Act of Parliament put a stop to their shameful variation. Though subject to no appeal to any other Court, they were constantly liable to, and affected by appeals from the House at one time, and in one cause; to the House at another time, and in another cause: An *appellate* jurisdiction, of all others the most dangerous, and found, in experience, to be the most destructive of the end of judicial determinations, which is to do justice, to quiet minds, and give stability to their rights and possessions.

With regard to our Author’s second branch of the Law of Parliament, it is a division, that instead of *distinguishing*, does most effectually *confound* the things professed to be separated. I can hardly make sense of the *Statute Law* being a branch of the Law of Parliament, in the sense in which our Author uses the last term, namely as in contradistinction to every other species of Law. But if he allows the Statute Law to be part of the Law of Parliament, so far as it *regards the House of Commons, or the jurisdiction thereof*, it is difficult to conceive

conceive, how he can exclude the Common Law from being also a part of the Law of Parliament under the same limitation: For it cannot be denied that the Common Law is of equal force with an Act of Parliament. And it is a jest to say, the Common Law does not regard the House of Commons, or the jurisdiction thereof, as much as some particular Statutes do. Our Author, however, had a very good reason, which will hereafter appear, for not including the Common Law in his definition of the Law of Parliament. The real truth is, neither the Statute Law nor the Common Law are, in any proper sense, part of the *Lex & Consuetudo Parliamenti*, though that may, properly enough, be said to be part of the Common Law of the Land. But both the Statute Law and the Common Law are a Law to Parliament, as well as to inferior Courts, when they are the Law of the Subject upon which the jurisdiction of either House of Parliament is exercised.

Our anxiety to set our Author's doctrine as to the nature of the Law of Parliament in its true light, has drawn out this last observation to an unexpected length. We now proceed

Fifthly, to observe upon the general scope of our Author's argument, That we do not perceive the occasion there was for the proofs he has brought to establish the power of expulsion, and therefore pass over the pages occupied therewith. Neither can we find that he has given any thing like an argument upon the more material head of *incapacity* or *disability*, but two. The first is, that expulsion by necessary consequence and *ex vi termini* includes incapacity, the illustration of which, fills from the top of the 9th page, to the bottom of the 12th, but proof or authority there is none offered. The second is, what was before mentioned, that, "admitting expulsion does not create

“ incapacity, the House of Commons have a right
 “ to declare who are, and who are not, eligible as
 “ Members of Parliament,” which is the doctrine
 laid down at the bottom of page 12.

How far this is a proper method of vindicating the proceedings of the House of Commons, it is for our Author to consider. But it is clearly changing their ground, as they have laid the incapacity upon the expulsion. Perhaps our Author thought this foundation needed to be strengthened.

In support of the doctrine in the second position, we are referred to nothing but this single proposition, “ that the House has the sole and exclusive
 “ right of determining all matters of, and incident
 “ to elections and returns.” To establish which proposition, a number of authorities and cases are cited, which fill up from the top of page 13, to the bottom of page 30. But with these authorities and cases we have very little to do, as we do not dispute the proposition itself. What we have to observe is, that our Author has placed the *essence* of the proposition in the *exclusiveness* of the jurisdiction, whereas the most essential part of it is the object of the jurisdiction; namely the qualifications and disqualifications of the Electors and Elect-ed: And the point is, whether the right to judge of these reaches to, or includes a power to incapacitate or disable; or what is meant by declaring who are, or are not eligible.

The authorities which prove the exclusive jurisdiction of the House of Commons to judge of the qualifications of the *Electors*, conclude nothing to the power of incapacitating the *Elected*. Thus, at once, we get rid of all the cases from p. 13, to p. 26. As to the qualifications of the *Elected*, it is said (p. 26, med.) “ the right of the House to
 “ decide with respect to them was not in any of
 “ the cases disputed.” But then it remains to be settled,

tled, what is implied in *deciding upon the qualification and disqualification of the Elected*. And this must depend upon "the sense in which the words *qualification* and *disqualification* are taken.

If *qualification* and *disqualification* of the *Elected*, are quite synonymous terms with a *capacity* and *incapacity to be chosen*; and *deciding* upon the qualification and disqualification of the *Elected*, is a convertible term with *declaring*, or by declaration, *making one eligible*, or *not eligible*, then it may be enough to say, the House of Commons are admitted to have the sole right of deciding with regard to the qualifications of the *Elected*.

Such an exposition, or conversion of terms however, not being self evident, it is not unreasonable to demand some authorities; and without authorities, no one is at liberty, in argument, to use the *different* terms *indifferently*. Which compels me for a

Sixth observation, to put our Author in mind, that this is one instance more, in which he has egregiously trespassed in the article of confusion of terms; and that his argument must necessarily, from that very circumstance, be loose, deficient, and inconclusive.

It has already appeared in the different places which have been occasionally cited, that our Author's general proposition is this; "That the House of Commons have the exclusive power of examining and determining the rights and qualifications of Electors and Elected."—page 13th. Which is formally stated, as convertible with the right of the House to *declare who are, and who are not eligible*; because in support of the latter, the former is undertaken in the same page 13, to be proved, and is the only proof of it.

Again, in page 26, It is the "*right of deciding with respect to the qualifications of the Elected*," which

which is said not to have been disputed. But instantly, in the very next page 27, we find the terms *Capacity* and *Incapacity* substituted in room of Qualification and Disqualification, and used exactly as of the same import. Thus, says our Author, (page 27, at the top) "When the body which expelled him is dissolved, his *capacity* of being elected revives.—The *incapacity* is not perpetual." And but two lines lower, the term *disqualify* is resumed as equipollent.—"the House of themselves can *disqualify* any Member."—And again in the next paragraph, the term *disqualify* is repeated, and applied with the same indiscrimination, in these words.—"By their resolutions only, persons of various classes are *disqualified*."

It is nevertheless evident, that those terms are of the utmost importance in the argument. They enter the very essence of the question. Yet our Author confounds, changes, and alternately uses them, without offering, or having to offer, one single authority to warrant it. The reasons will hereafter appear, why this promiscuous application of the terms cannot be admitted of. At present we shall only say, that where terms are promiscuously used, without settling or affixing their precise signification, it is impossible the argument can proceed with real force, or conclude to fair demonstration. In farther confirmation whereof, we may observe,

Seventhly, That our Author also introduces *forfeiture*, as another equivalent term, mixed up in the jumble, with *disqualification* and *incapacity*. He confounds a judgment or sentence of the House of Commons, applying or giving effect to a forfeiture incurred by law, as the same thing, and of the same import, with their *making an incapacity to be chosen* by their own declaration or resolution.

lution. Thus in page 27, after asserting, as before-mentioned, that “ the House of themselves “ can disqualify any Member during that Parlia- “ ment,” he adds, as the reason or proof of that as- “ sertion, “ That whatever sort of a Right, the “ right of being elected is, it may, like other “ rights, be forfeited by crimes and misdeme- “ nours,” and (says our Author) “ Who should “ judge of those causes of forfeiture, but the bo- “ dy of which he is a member ?”——As if *judg- ing of a cause of forfeiture incurred by law*, was no- “ thing different from *making the cause of forfeiture* without any other law, but the sentence or reso- “ lution which inflicts it ; than which nothing can be more absurd.

It seems therefore to be totally beside the pur- “ pose, what our Author proceeds in the very next “ line to say, that “ indeed the right of jurisdiction “ in the House of Commons, in this respect, is “ so fully established by immemorial usage, that “ it cannot be disputed without controverting the “ fundamental principles on which the law of the “ land depends.”——From this the only thing to be collected, is irresistible evidence, that our Au- “ thor means by the *right of judging of a cause of forfeiture*, the same thing with the *right of deciding with respect to the qualifications of the Elected* ; which in the preceeding page 26, he informed us, “ had “ not been in any of the cases disputed.” Ac- “ cordingly upon that principle, and in confirmation or illustration of what he says in page 27, as above- “ cited, “ that the right of jurisdiction in the House “ of *judging of causes of forfeiture*, “ was so fully e- “ stablished by usage,” he proceeds to mention that “ the House, as appears from their journals, “ have determined with respect to the *qualifica- “ tions of the Elected*, from time to time, down “ from the year 1553, to the present period : “ And

“ And it is (he adds) by their resolutions only,
 “ that persons of various classes are at this day
 “ disqualified.” Which leads to this

Eighth observation, That whereas our Author's general position is, “ that the House of Commons
 “ has the sole right of deciding upon the qualification and disqualification of the Elected,”—upon which *alone* he rests the proof of this other proposition, “ that the House have a right to declare who are, and who are not eligible as Members of Parliament :” When he gives us a list as he here proceeds to do in page 27, and down to page 32, of the various classes of persons, who by the resolutions of the House of Commons *only*, are at this day disqualified ; or, as he immediately expounds the term, are by *their resolutions not eligible*, such as clergymen, judges, &c. or when, as he expresses himself in page 29, he gives us “ various other instances, in which, besides these permanent disqualifications, the House have determined and adjudged with respect to the qualifications of the *Elected*, adjudging persons not to be eligible :” I say, when our Author does this, it will be necessary, in considering his list and instances, carefully to attend and distinguish to which particular *species* of non-eligibility, (which is a term that comprehends every thing) rank'd under the *genus* of *decisions upon the disqualifications of the Elected*, the instance produced refers and belongs. For, as our Author has, by a juggle of words, confounded under one generick description of decisions upon the disqualifications of the *Elected*, every particular species of disqualification, properly so called, and every species of incapacity, and also forfeiture, and that sort of disqualification, which I should term disability, and non-eligibility by mere declaration or resolution of the House of Commons : It is plain, that in an accurate discussion

cussion of this subject upon the precise and distinct terms, no instance or class of instances can have the least pertinence to the real question, but such as specifically belong to that sort of disqualification or non-eligibility, which ought to be termed disability by the mere resolution and declaration of the House of Commons. It is evident that every instance of disqualification, incapacity, forfeiture, disability, or non-eligibility, arising from any cause *external* to the resolution or declaration of the House of Commons; or springing out of any law or constitution antecedent to, and independent of such resolution, is totally foreign to the present dispute.

Whether, or how far, the instances given by our Author in his list do, or do not belong to the one or the other of those descriptions, will be examined hereafter. We are at present only speaking of the general construction, scope, and tendency of our Author's reasoning; and it is sufficient to have given this hint of the caution necessary to a just consideration thereof. That we do it not without reason, will be still more manifest, when we farther observe, in the

Ninth place, That nothing can be more vague, loose, and confused, than our Author's expressions as to the declaration or decision of the House of Commons, by which this incapacity is made, or, in his language, is declared; although upon this very thing, his whole argument hinges, and its force entirely depends.

Our Author has given it no less than three or four different turns, and all of such different import, as most materially to affect the question. In page 10. §. penult. he says, "the House may declare who *by law* are not to be chosen;" secondly, at the bottom of page 12, he says, (leaving out the words *by law*) "the House have a
" right

“ right to declare who are, and who are not eligible, as Members of Parliament.”—Thirdly, in page 27, at the top, it is said, “ the House of themselves can disqualify any Member;” ’tis indeed added, “ during that parliament,”—but the length of time is not of the essence of the question. Here too, also, may be observed, fourthly, what is said page 30, §. penult. That this House “ have exercised the right of adjudging and declaring the incapacity of being elected, not only as expositors of the written, or statute law, but even *where the law has been silent*, they have adjudged persons incapable of being elected from the particular *circumstances of the case*, and upon general principles of *constitutional policy*.”—And lastly, what is mentioned, page 27, That “ it is by the resolutions of the House *only*, that persons of various classes, are this day disqualified.”

The judicious reader will carefully ponder these various modifications of this declaration of disqualification, the House of themselves can make; for the several shades differ exceedingly, and the variety of expression is not a little perplexing, in an argument which requires the nicest precision, and the force whereof, depends entirely on the terms of the question. Light and darkness do not more disagree, than those different kinds of declaration, or adjudication, which our Author has heaped together. Nor can latitude or indistinctness of expression, be more industriously used to darken and confound a serious and interesting disquisition. As a

Tenth observation, I cannot help taking notice of one particular part of our Author’s reasoning, though very unwilling to lengthen out this part of the work with trifles below observation. Page 27, at the top, our Author is pleased to express himself

self thus : " None can say that, in the present instance, the right of being elected is taken away ; " for in truth it is only *suspended*, during the existence of this Parliament." Now this is clearly making the term or endurance of the disability, the sole foundation of the power from which it is derived ; which is an origin of jurisdiction, I am not acquainted with, and must, I think, be singular in the House of Commons. In other courts, it is the jurisdiction which warrants the act, and not the act which founds the jurisdiction.

But, waving this, it appears to me that our Author is rather too ludicrous here for the subject he is upon. He strangles the constitution, only it is with a silken cord ; as if the sound of the word *suspend* could diminish the effect of a real deprivation, or sweetning the potion deaden the poison. With the same breath that our Author tells us the right is only suspended, he gives the act its true denomination, when he says in the next line, " the *capacity* will revive—and the *incapacity* is but " temporary"—adding at the same time the harshest of all names, when he calls it a " forfeiture." I know not what comfort it would be to a person unfortunate enough to be shut up in a dungeon, to tell him his liberty was not taken away, but only suspended, because he was adjudged to be imprisoned for no more than seven years ; or to alleviate the loss of an estate, by informing the sufferer the enjoyment of it was only suspended, because it was forfeited no longer than during the existence of several generations. It is not in words to alter the nature of things. The right in question is taken away *effectually*, though not *for ever*. And if to make the incapacity perpetual, is, what our Author says in the better opinion *perhaps* (for he is very cautious in his expression) an Act of Parliament,

ment only is sufficient, it may merit the enquiry we shall hereafter bestow upon it, how any thing but an Act of Parliament, or some other Law of equal force, can take it away for any space of time; since as the logicians say, *majus aut minus non variant speciem.*

I am glad to conclude this first and most disagreeable part, by only farther taking notice in the last place, that our Author has, I think, unsuccessfully endeavoured to avail himself of an inaccuracy at best, which he imputes to the advocates on the other side of the question, when he tells us, p. 26, “ they contend that the right of being “ elected is a *common Law* right, of which no man “ can be deprived but by Act of Parliament.” Who is alluded to I know not. The right in question is derived from the *constitution*, in which the people of England have an inheritance, as they have in the ordinary course of justice, which the Commons of England have called the Common Birth Right of the Subject. An Act of Parliament itself to take away the Common Birth Right of the Subject, would be an Act to take away Parliament and the Constitution wholesale. But common right may be limited or taken away by operation of law and change of circumstances in the person of any individual.

Our Author's answer to what he says is contended for, is but a poor one. He says, “ in the first “ place, it is assuming a proposition for granted, “ which may safely be denied, because the right, “ as was said in the cases here cited, is a *Parliamentary* right, to be exercised only in Parliament, and therefore cognizable there only, “ where the duty is to be executed.”—That is but jargon. The right of being elected is a *common law* right in its origin and foundation, and a *Parliamentary* right in the use and exercise of the capacity

capacity conferred by the election; that is, the right of sitting and voting in Parliament. The right of being elected can be exercised no otherwise than by enjoyment, and it is not enjoyed in Parliament, but in the community,—as a right of citizenship. It exists before, and together with, the right of membership when chosen, and subsists after that ceases. It is the common right of the subject, and it is so described by Lord *Coke* and Dr. *Blackstone*, both of whom assert, that every subject of the realm (not disqualified by law) is eligible of *common right*.

The Author's other Answer, that the right is not taken away but suspended, merits no more attention than has already been paid to it.

The remaining part of our Author's performance from p. 31, to the end, being only to prove that the sole right of judicature in matters of Election, *ought* to be vested in the House of Commons, and that the late determination was agreeable to adjudications in *Westminster Hall*; it is unnecessary to make any observations thereupon: Because the jurisdiction itself is admitted, and the property of it assented to. Nor would I wish it to be taken away, even because of errors that have been committed in the exercise of it. On the contrary, I subscribe most heartily to all the authorities cited by our Author in support of the exclusive right of judicature in the House of Commons: And I honour as highly as he can, the firmness with which they have resisted every attempt to invade their jurisdiction in matters of election, and have also asserted their sole right to order writs for filling up vacancies during the subsistence of Parliament. *These* I consider to be fundamental rights of the House of Commons, and essential to that great right of the people *the freedom of Elections*.

With

With regard to the other matter of comparison with the adjudications in *Westminster Hall*, I am ready to admit, that where there is a clear legal incapacity, votes given to the persons incapacitated, may be considered as no votes at all, if they are knowingly so given, because such is the *summum jus* of the case: and therefore the question here, is, as to the incapacity itself, which brings us, as was proposed, in the

Second place, more directly and precisely to show what is *not* the question, which (as I said) will in effect only be to give that which our Author erroneously substitutes in place of the true question, or by which he diverts from it. And

First, it is not a fair, at least it is not a distinct state of the question, which is included in the proposition with which our Author sets out, as the thing he is to prove as decisive, namely, “ that
“ the House of Commons is legally invested with
“ the power they have exercised, with respect
“ to the late determination of the election for
“ *Middlesex*, and that they ought to have such a
“ power, and, in the instance in question, have
“ exercised their power in a just and constitutional
“ manner.” The ambiguity lies in the term, *Power of Determination*. And we refer to the general observations which have been made.

Secondly, The question is *not*, nor is it *any* question, or of the least influence upon the present debate, whether there be such a thing as the Law of Parliament, or if it be part of the Law of the Land. Both are admitted. And so far as it is of use in this question to know what the Law of Parliament is, or in what sense it is the Law of the Land, our Author has given so very imperfect an account of either, that it cannot be learned to any purpose from all he has said. Neither

Thirdly, is it the question, whether the House

of Commons has the sole and exclusive power of punishing its own Members *as such*; which is the first clear and direct proposition our Author needlessly employs himself in proving. For this power is not denied to be inherent in the constitution of the House; as indeed some *internal* power of correction seems to be incident to every society. Nor is it of any consequence, to dispute in this case about the modes of punishment specified by our Author, *viz.* Commitment, Suspension and Expulsion. What the "*otherwise*" he adds may be, I knew not. The power of Expulsion is the only thing we have to do with at present. And, I take for granted, it is generally conceded, or at least not disputed, as standing on the most antient, constant, and continued practice, which does, I think, establish it as the Law and Usage of Parliament *.

Fourthly,

* As to commitment, there is no doubt, suspension so far as it means a sequestring till trial, and which must always be the effect of commitment; or if it means, excluding from sitting while the very externals of the return, or right to sit, are questioned, which was antiently done by a recommendation to a person to forbear to come into the House; and at this day is done in the case of Double Returns, by declaring both members to withdraw: Such a sort of suspension I can understand. Nor will I deny but the House has gone farther than this under the idea of suspension as a punishment: As indeed what have they not done! But from our Author's own list, the word suspend has not been used in this century, and but once for an hundred years back: And it has been used ofteneft at least, in the other sense I have above mentioned, merely to sequester. If the question were now used to occur, I am apt to think suspension, as a punishment, would be found not to be a constitutional proceeding, or authorized by the Law or Usage of Parliament, but rather as an anomalous and unnecessary mode of correction, affecting the constituents and the whole kingdom, who are not to be punished by the want or mutilation of parliamentary representation for the fault of an unworthy member.

With regard to expulsion, I shall say a few words more, because I know there has been an inclination with some to shades of a particular opinion about it. It does to me appear to be too late now to call

Fourthly, The question is not whether the House of Commons has the sole and exclusive power of examining and determining the rights and qualifications of Electors and Elected, together with the returns of writs for the Election of Members, and, in short, all matters incidental to such Elections: The proof of which, as our Author's second direct, and indeed his chief position, consumes above half of his performance. For this proposition also is admitted. What the nature and extent of the jurisdiction and authority exercised by

call in question the power of expulsion, supposing there might have lain objections to it at first. It is so rivetted in practice without contradiction or controul, as to have become, in my opinion, fairly the Law and Usage of Parliament. For my own part, I have no objection at all to it; and I shall have occasion by and by, in explaining the nature and end of expulsion, to say what may probably justify the expediency and necessity of the power. I know it has been said, and not without some appearance of plausibility, that expulsion is a power the House of Lords has never exercised upon any of its members, except in the case of Lord Bacon; though the purity of the peerage, being the higher orb, and of yet a brighter tint, ought at least to be as refined as that of the Commons, seeing it gives not an elective, but a perpetual voice, not only in the legislature, but in the last resort of all judicature both civil and criminal; where the peers judge not even upon their oath, but upon their honour, which is so sacred and delicate, that 'tis said a peer may, in a case of property vote even in his own cause. The House of Lords certainly did by their sentence against Lord Chancellor Bacon, deprive him of his seat in the House, declaring him, not only unworthy of his office, and of having a place in the House of Lords, but also incapable of holding any other office or place, and imprisoning him during the King's pleasure, which was of itself one way of sequestering him from Parliament. It is also true, that in the case of the Earl of Danby in the reign of Charles II. when the peers, for favouring the King's particular views, wanted to stop the prosecution of the Earl by impeachment, they made an offer that he should, among other things, be made for ever incapable of all offices and employments, and of sitting in the House of Peers: But they proposed to do it by Bill, a draught of which they produced in a conference with the Commons,

by the House of Commons in this matter : And what is to be understood by the qualifications of Electors and Elected, or is fairly and legally implied in the power of examining and determining them, will be hereafter more fully considered, and has already been, in some degree, spoken to in the general observations premised.

Fifthly, We do not apprehend it to be any part of the present question, whether Mr. Wilkes was justly or unjustly, or for what offence he was expelled in the late Session of Parliament : Or, whether

mons. The Commons however were not satisfied with such a Bill, for which they had their own reasons. And afterwards, when the Lords sent down to the Commons a Bill they had passed for the banishment of the Earl, it was again offered, to appease the wrath of the Commons, that Lord Danby should be degraded from his peerage, as well as banished : but the Commons rejected the Bill, and not listening to the offer, ordered in a Bill of attainder, the Earl having by that time withdrawn himself. This case therefore may seem to prove rather the greater propriety, if not the necessity, of an Act of Parliament, instead of a judicial sentence of the House of Lords, for depriving a peer of a seat in the House. But it would also seem to prove the same as to the other pains and penalties proposed to be inflicted on the Earl of Danby : Which runs quite counter to the sentence of the House of Lords against Lord Bacon, the legality of which is hardly to be given up ; especially considering that the Lords have pronounced the like sentences upon Commoners ; particularly in the case of Sir Giles Monpeyson, whom the House of Commons expelled, and referred to the Lords for farther punishment upon their complaint. In the latest case of the kind that has occurred, the House of Peers upon the trial of a noble Earl, who held the same high office with Lord Bacon, for offences somewhat of the same complexion, did not choose to follow the example of Lord Bacon's sentence as to exclusion or incapacity. For which, no doubt, the House had its particular reasons ; but they might be, and, from the circumstances, probably were such as bore no relation to any question as to the power exercised in Lord Bacon's case. The judgment therefore in that last case, is no authority either way : And the point must remain in its present state of uncertainty till farther cleared up : Which for the honour of the peerage, it is to be hoped, there never may be an occasion for.

If,

whether for such offences as Mr. Wilkes has been convicted of, and now is in execution for, infamous punishments might, or as our Author says, frequently have been inflicted. Nor whether suffering an infamous punishment, inflicted in a course of law, does infer an incapacity to be elected a Member of Parliament. For, on the one hand, Mr. Wilkes was *de facto* expelled, and on the other, he has not, *in fact*, suffered, or been condemned to any punishment understood by the law of this country to infer infamy. By the bye, I imagine it is the cause of, and not the punishment itself, which infers the infamy.

Sixthly,

If, having one clear Example, we might presume to venture an opinion, I must confess, I think the jurisdiction of the House of Lords implies so much of the highest power that the rule, *maius includit minus*, must have place. Nor can I see any good reason why the House of Peers should not have this power over their own body. There seems on the contrary to be cogent motives of public justice, why they should have it for this most essential purpose, of preserving the fountain of judgment, in which the state, and all the subjects of the kingdom are deeply interested, pure and untainted. At the same time it may not be so clear that the argument, as to the right or power, would proceed from the House of Lords to the House of Commons: Because, in whatever sense the House of Commons may be called or considered to be a *Court*, they differ widely in this respect from the House of Lords; which in the highest notion of the term, is the universal, sovereign, and supreme judicature of the nation, whose jurisdiction is not confined to its own members, or founded in the particular relation to their body, but extends over all orders of subjects, and acts in the regular course of *legal Trial*. On the other hand, the congenialness of the powers of the two Houses over their own Members, merely as a *parliamentary* jurisdiction, and the interest which the constituents have in their own representation, that it be pure as well as perfect and complete, might be thought (if we were reduced to reason upon principles) to argue for the power of expulsion in the Commons, as an original inherent right. But, as things stand, it must, I think, appear that the power of the House of Commons, in regard to expulsion, is too firmly fixed, by usage and exercise, now to need any other support, or to be liable to be shaken: At least it is so, if there can be, as doubtless there can, a jurisdiction acquired by usage and prescription.

Sixthly, It does not appear to us in the least to concern the merits of the real question in debate, how and in what manner, whether with unanimity or division, the vote of the House of Commons passed, resolving or adjudging Mr. Wilkes to be incapable of being elected a Member to serve in this present Parliament, which is flung out by the writer of the *Serious Considerations*, as a kind of *argumentum ad hominem*. Of the same insignificancy is it also, that, *supposing* Mr. Wilkes to have been actually under a legal incapacity or disability to be chosen, when he was re-elected after the expulsion ; such re-election might, on that supposition, have legally been adjudged to be void : And upon his being a second time re-chosen, when another candidate appeared upon the poll, the votes given to the person supposed to be disabled, might be considered as thrown away, and the candidate having the minority of votes, adjudged to be duly elected.

All we have to say on either of these points, is, that a vote of the House of Commons, however passed, is the act of the House, in legal construction. And if the House itself was thereby concluded as to consequences, still more were those who concurred in the vote adjudging Mr. Wilkes to be *incapable*, crippled as to the after proceedings, upon the subsequent elections of the county of Middlesex, as, upon *that* vote, what followed essentially and solely depended *. But supposing
any

* It must, however, appear somewhat odd, that when, under those circumstances, and for those reasons, it was determined, that the candidate who had the minority of votes, was duly elected, and ought to have been returned, because of the incapacity of the other, duly notified by the very writ of election, issued by order, and in terms prescribed for the purpose by the House,—the returning officer should not only not have been censured for making a false return, aggravated with an immediate and most
manifest

any good objection to lie against the adjudication of incapacity, made by such a vote, the dilemma into which the House was thereby brought, can have no real influence upon the adjudication itself; for that must stand or fall upon it's own merits.

Seventhly, It is nothing less than decisive of the present question, that, in fact, the House of Commons have, by resolutions of theirs, declared particular persons, or various classes of men, not eligible as Members of Parliament. For such a question may arise in determining the merits of an election; and the House, in exercising it's legal judicature upon an election, may have determined a person, or class of persons, not to be eligible, *strictly according to the known and subsisting law of the land*: Which is the true criterion by which to judge of all such determinations, when cited as authorities and precedents in the question now debating. And farther, if there have been determinations in this respect not *according to the law*, or contrary to the constitution; it will not follow that such determinations have, of themselves, made or altered the law or constitution, so as to authorize repetitions of the like.

Lastly, The fair discussion of the present question is *not* to be embarrassed with this consequence, that supposing the House of Commons to do wrong, and to involve themselves in a dilem-

manifest contempt of the House itself; but that it should have been allowed, as it cannot be denied it was, by some of the warmest sticklers for altering the return, that the returning officer had acted according to his duty and his oath. *That* to a plain understanding would seem to be tantamount to allowing that he acted according to Law; the consequence of which would be, that the Law is at war with the *Incapacity* adjudged by the House of Commons.

ma, or to reject any expedient within their own power, for extricating themselves out of such a dilemma, there is not in any of those cases any remedy; because the matter not being cognizable any where else, the determination of the House takes effect by its own force, and is subject to no appeal or review. For supposing all that to be true, the substantial merits of the case do not vary; the constitution, tho' infringed, is not, *ipso facto*, overturned. But in reality, the constitution does know the remedy, for an improper unconstitutional exercise or excess of a legal constitutional power, or for an illegal assumption of a power, unknown to the constitution, or destructive of it, if such instances do arise, *vindice digni*, were it otherwise the constitution would not be the *finished* thing it is, or so well deserve, as it really does, the character bestowed upon the Law of England, of being *the perfection of human reason*.

Having thus stated what the Question is *not*, and endeavoured to deliver it from what might darken or divert from it; let us now try to set up a true guide-post; when in the

Third place, we state what the real question *is*: And for preventing all ambiguity explain the terms necessary to be understood for exactly comprehending it. And

The short and comprehensive state of the Question seems to be no other than this—Was or was not Mr. Wilkes, he having been in that Session of Parliament expelled the House, incapable of being elected a Member to serve in this present Parliament? The words of the Resolution are, “That Mr. Wilkes *was*, and *is* incapable,” And the resolution is, by the order following hard at it's heels for a new Writ, thus paraphrased, “That
“ Mr.

“ Mr. Wilkes was *adjudged incapable of being elected a Member to serve in this Parliament.*”

But as our Author has chosen to confound *incapacity* with *disqualification*, forfeiture and ineligibility, I incline, before going farther, to fix our terms as clearly as I can.

An *incapacity* of being elected, in a latitude of signification, or in common parlance, may comprehend whatever hinders or obstructs one from being legally, or with effect, chosen. But to speak with precision, we ought to distinguish between *want of capacity*, and *incapacity*, properly so called, just as we do between *never having had* a thing, and it's being taken from us. Or in other words, I should say, there are incapacities of *defect*, and incapacities by privation.——Incapacities *defective*, and Incapacities *privative*.

Thus, as there are *natural*, so there are civil capacities, of which that of being elected a member of Parliament, is one : And we shall best understand what it is by instances of the defect, or want of it. The capacity is either strictly *radical*, and *original*, or *adventitious* and *superinduced*. For example ; a woman wants the original radical capacity of being elected a Member of Parliament ; being incapable by sex, of every State Office I know of, except being Sovereign or Regent of the realm. A Peer, or Lord of Parliament, is by his civil capacity, utterly, and in the nature of the thing, incapable of being elected a Member in the House of Commons ; the one term being absolutely exclusive of the other. An infant on the breast, or an idiot, I presume, are by nature incapable of being elected ; because it is morally, or indeed rather naturally, impossible they can be Members of Parliament. So in 23 Eliz. a lunatic having been returned a Burgess for Hull, another was chosen on a second writ, and the first having

claimed his place, or it having been claimed for him, the Commons examined the cause, and finding the return of lunacy to be true, they refused him. These are all original and radical incapacities by defect, or for want of that *state* upon which, alone, every other quality or ingredient necessary, to a perfect capacity must operate, and to which it must adhere, as the natural ground work and foundation. So we say, one is destitute of the capacity, or he has not a capacity in him.

Positive Law has superinduced certain qualifications, which, by constitution, are as essential to the capacity of being elected, with effect, as the original capacity itself. The Protestant religion is one. A Popish recusant is incapable of being chosen. One cannot be put up as a candidate, who, if present, refuses to swear to the necessary qualification in land; which in ordinary speech is distinguished by the appropriated name of *Qualification*. The oaths to government create another adventitious qualification: And we say, the person *qualifies* himself by taking the oaths. But this goes more properly to the capacity of *sitting*, than of being elected: as the oaths are not necessary to be taken before election. However, if refused in the House, the Seat is void as if no return had been made. So a Quaker having been returned a Member, he was called in to the table, and declining, upon being asked, to take the oaths, though he offered to affirm in terms thereof, he removed, and the seat was declared void. Persons also having sat without taking the requisite oaths, have been held to be incapable of being Members, as if they had not been returned, and considered as objects of punishment, as if they had come into the House without being chosen. It was so adjudged in the case of Sir John Leeds.

An

An incapacity by privation is nothing else, as the term itself plainly enough intimates, than a person's being deprived of the capacity which he had radically or inherently, and that was rendered perfect by every other super-added requisite qualification. So we say, One is *incapacitated* as by a stroke of force, or act of power, whether by himself, or by a power external to him : And this supposes the person before to have *had* the capacity, as one being stripped or divested of any thing, implies the anterior possession of it.

This sort of incapacity is also very properly termed a *disability* ; because the person is disabled, *i. e.* he is deprived of his natural and former capacity, or right to be elected : Which can only be done by some act *of* or *upon* the person who had the capacity, or upon the capacity itself, or upon the original and radical state and title, or the super-added qualifications which constituted the antecedent capacity.

The privation may be absolute and radical, going to the very foundation, being, and existence of the original incapacity, in the nature of a perfect *annihilation* or extinction : As when a Commoner is created a Peer, or a person becomes civilly dead by an attainder. Or the privation may be *sub modo* qualified and limited ; as when it does not affect the original radical capacity, but only touches some of the extrinsick or adventitious qualifications. For if the privation reaches the original radical state and title, which is most of the essence of the capacity, it is, in it's nature an annihilation or extinction, whether it does or may operate for ever, or eventually only for a limited time ; in which last case, the revival is a resurrection, or new beginning of existence. Therefore it was, that in one of the general observations, we objected to our Author's cobweb distinction,
when

when he says, the Right of Election is not taken away, but suspended, because the incapacity is not perpetual, but only temporary, being limited to the existence of the subsisting Parliament. An attainder itself may operate but a temporary privation. A suspension more properly refers to the ceasing of the adventitious qualifications, which may rise and fall by accident.

Nothing more is necessary at present for applying the distinctions we have made, but to mention that the incapacity Mr. Wilkes is supposed to be under, is an incapacity by privation inflicted either mediately or immediately, or in both ways, by the act of the House of Commons.

The general question, as stated before, does therefore, if we follow the Author of the *Case*, divide itself into these two subordinate branches.

First, Whether Mr. Wilkes was incapacitated by the expulsion; which seems to be the sense of the adjudication of the House of Commons.

Secondly, Whether admitting (as our Author speaks) that expulsion "does not create an incapacity of being re-elected;" yet Mr. Wilkes was *incapacitated* by the posterior resolution of the House, by virtue of the power ascribed to the House, as expositors of the law of the land, to declare who are, and who are not eligible as Members of Parliament: Or (as the Author elsewhere expresses himself) to *disqualify* by their own resolution.

We proceed therefore, in the

Fourth place, to lay down what we apprehend to be the principles and grounds upon which the question as above stated, explained and divided, ought to be tried. And

First. The question so far as it depends upon the virtue or effect of the expulsion only, which
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is the first branch of the sub-division, must, I think, be tried on one or other of these grounds.

1st. The natural and necessary import of the term Expulsion; including, as our Author says, by necessary consequence, or *ex vi termini*, such an incapacity as is contended for: To which our Author confines the whole of what he says upon the point. Or,

2dly. The acquired or adopted signification, if there any is, of the term Expulsion; fixed by such a constant practical use of the word, in the House of Commons, which is the only competent authority, as is sufficient, by construction or express declaration, to expound the term Expulsion, as necessarily including or referring incapacity: To which must be referred the precedents, and authorities, alledged to be of that import by express determinations.

3dly. The constitution of the House of Commons, and the nature and extent of the authority and power by which the House inflicts the punishment of expulsion: By which we shall see, (if it can thence be shewn) either that the power and authority is not of that sort or strength, that such an effect as incapacity is within its reach: Or, on the other hand, it may appear, that the power and authority is such, that expulsion not only may, but must carry that consequence with it, as necessarily, as a cause produces it's effect; unless we admit an unnatural maiming of the expulsive power, or alledge an actual restraint and limitation in the act of expulsion, on purpose to diminish it's effect.

Or lastly, the end and design, the use and purpose of Expulsion, from which it will appear, if it can be made appear, that expulsion does not answer it's manifest end, unless it includes incapacity: And consequently, the necessity of it's implying

plying such an effect, will be demonstrated ; or it will be shewn on the other hand, that it would be as useless, as unfit and improper that it should go so far.

Again, considering the question as in it's second branch, upon our Author's doctrine, that the resolution of the House of Commons, adjudging a person incapable, is sufficient of itself to disable or disqualify any man from being a Member of Parliament : This must infallibly be tried upon the following grounds and principles.

First, The character or capacity in which the House of Commons act, when they do and only can make resolutions or adjudications with regard to incapacity : And the nature of the power competent to them in that character.

Secondly, The subject matter upon which the power competent to the House in that character and capacity, operates or is exercised : And the bounds within which it is, in this respect, legally circumscribed.

Thirdly, The law that governs, and ought to govern the House in the exercise of the power belonging to that capacity in which they then act : Which will involve the consideration of the law of Parliament ; what it is, and how far that alone, or any other species of law, is the rule of their proceeding in such cases. And,

Fourthly, Which is properly a branch of the last ; but I choose to mention it by itself, because of the importance it will be thought to be of. The precedents of general resolutions and determinations of the House of Commons, which have been cited as sufficient to establish a power or authority in the House, by their own resolution singly, to adjudge persons to be ineligible, or to disqualify them to serve as Members of Parliament.

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The method we proposed brings us now in the

Fifth place, to examine the question in both its branches upon the foregoing grounds and principles, upon which only, as we have presumed to say, it can be fairly tried. And

1st. Does expulsion, *ipso jure*, create an incapacity of being re-elected in the same Parliament?

Let us, with our Author, try it first upon the meaning of the word expulsion. Here it may be observed, that our Author is mistaken, when he says the word expelled has for more than a century been constantly used. The instances quoted by the writer of the *Considerations* prove the mistake. And as since the Revolution, about the time of which the term *expell* began to be regularly used, expulsions have been less frequent than before, and very rare since the Accession; it is not to be much wondered, if there has not been, in that latter period, much discussion on that subject, so as to have made a settled standard for the signification of the word, by the authority of cases in Parliament.

Another observation to be premised is, that though our Author has given us a variety of synonymous expressions used in older times, such as, *severed, cut off, removed, discharged, put out*; he has overlooked others full as frequently made use of, viz. *disabled, incapable, unworthy, and unfit* to be a Member, or of the like import. Our Author had a reason for omitting these phrases: And the reason will hereafter appear. I only mention this now, because the writer of the *Considerations* has endeavoured to raise a particular argument upon the word *disable*, used in antient expulsions; infusing into it an emphatical signification, which, I shall presently show, the inaccuracy of old fashioned clerks and journal-writers, knew nothing of,

when they and the Parliament Men of those times used the word.

The position asserted by the Author of the *Case*, is, that “ however various the causes of expulsion may have been, the effect of it is constantly the same. For the necessary consequence of expulsion, (he says,) is, that the Person expelled, shall be incapable of being elected again to serve in the same House of Commons that expelled him. This incapacity is implied in the very meaning of the word itself.”

His argument or proof is no other than this: “ Should (says he,) any man of plain sense, nay should any young academian, or school-boy even, be asked what was understood by expelling a man from any society, they would certainly answer, the meaning is, that he shall never be a member of that club, or of that college, or of that school, any more.”

This is literally a childish argument, and a school-boy is too good to answer it. Would not any child almost wonder, if upon being put out of a room by his parent for misbehaviour, it was told by another person that it could never be suffered to go into the same room again, as long as its parent lived? Is any school-boy so ignorant as not to know, that though a scholar expelled cannot belong to the school till he is again admitted, yet he *may* be restored? Or was one never re-admitted into a club, a college, or a school, from which he had been expelled?

A Member of Parliament *expelled*, is cut off and severed from the Parliament. His relation to it is dissolved. But why may it not revive in the same way it was created at first? The master of a school, governors of a college, or a club, have the power of admission, and thereby of constituting the relation of the members. The House of
Commons

Commons have *not* the power of creating a Member. *That* the Electors only have; and by their election the relation is created at first, or revived after it has ceased or been dissolved.

But says our Author, "expulsion clearly, *ex vi termini*, signifies a total, and not a partial exclusion from the Society, or Parliament, from whence he is removed."—Most certainly. The expulsion dissolves the relation as much as if it never had existed. But it is not like the dissolution of marriage by death or divorce: For the relation may be restored in the regular way of constituting it, whatever that is.

It is true what our Author adds, That "when a Member is expelled, he is not excluded from the meeting of that day, or of that session, but from that Parliament: that is, from that body of which he is a Member." And he cannot be excluded from any Parliament, but *that* of which he is a Member, because from no other can he be expelled, having a relation to none else. But he may again become a Member, and return to have the same relation: For one turn'd out upon a void Election, or a false return, instantly ceases to be a Member as much as if he never had been returned, being substantially, though not by the same form of expression, ejected: Yet he may be re-chosen and will then be a Member as before.

It is not, therefore the being put out or excluded, which is the real *vis termini* of expulsion, that hinders one from being brought back again and entering a fresh by the same door at which he came out. The natural meaning of the word is too weak a bar for ever to shut it against him.

The next enquiry therefore is,

Secondly, If there be an acquired or adopted signification of the term expulsion, fixed by a con-

stant practical use of the word in the House of Commons, or any express precedents by judgments of the House, of sufficient authority to ascertain that in the sense and usage of Parliament, expulsion necessarily includes and infers incapacity.

The Author of the *Case* has left this upon the negative evidence of the fact, “ of there never
“ having been any attempt made to re-elect one
“ in the same Parliament, out of the very many
“ who have been expelled, except in the single
“ instance of Robert Walpole, Esq; when the
“ House declared the effect of their vote of expulsion”—and, (says our Author,) “ there cannot be a stronger instance, that, in the general
“ sense of mankind, such incapacity is the necessary effect of expulsion.”

But supposing the fact stood precisely as stated by our Author, which it does not, as will hereafter appear: And supposing that Sir Robert Walpole's case had also been a *silent* one, added to the negative number, the proposition is by no means proved by such sort of evidence. For till the question occurs, which it can only do upon a re-election, it cannot be tried; and until it is tried and determined, it remains at best a moot point. The negative evidence arising from no re-election, after expulsion, does not prove that incapacity was the cause of there not being a re-election, no more that fifty decrees not appealed from, will prove that an appeal does not lie from the court which pronounced them. Nay, it does not prove that the expulsion was the reason of the person's not being re-elected; because elections depend so entirely upon the will of the Electors, and the means and motives thereof are so various, that any election proves nothing but the predilection of the Electors in favour of the Person actually chosen. If a person whose feat

is vacated by accepting of an office which does not disqualify him, is not re-elected, it does not prove that it was because of his accepting the place, and not on account of his own inclination to retire, that another is chosen in his stead.

But granting it were certain that the expulsion was the cause why the Electors did not again choose the person expelled, it could only prove that the Electors agreed in opinion with the House of Commons, that he was not fit to sit in Parliament. And it might nevertheless be true, that if they had differed in opinion with the House upon that point, they would again have elected their old Member, notwithstanding the expulsion. For Electors may so far disagree with the House, as even to think the very cause of expulsion a meritorious ground for re-electing the person expelled.

On the other hand one single instance of a re-election after expulsion, is better proof that it has not been the general sense of mankind that incapacity is the necessary effect of expulsion, than an hundred instances of persons expelled and not re-elected, are that it is. For such a single instance necessarily brings the question into judgment, being an express declaration of the sense of the electors, and their appeal to the House itself for a decision. If therefore it can be shown that a Person re-elected after expulsion did sit, it is incontestible evidence, and of decisive authority, that it was not the sense of Parliament, that expulsion created an incapacity. It is a positive proof of the negative, and the only one the nature of the thing admits of.

Now upon this head several instances have been referred to of persons expelled, and re-elected, and sitting in the same Parliament.

Sir

Sir Robert Sayer, expelled 20th Jan. 1689, has been mentioned as one that was re-elected. But as it appears the Parliament was immediately dissolved, so that no question would be tried upon his re-election, this case does not come up to a full authority. It is no proof however, as has been said, that he was not re-elected, that the return is not found in the Crown-Office, where more of the old returns are missing almost than are extant.

But the answer that has been made in the *Considerations*, p. 25, to the cases of Mr. Holborne, and Sir William Pennyman, who were both expelled on the 11th August 1642, by no means takes off the force of those cases. It is admitted that both the names appear again upon the Journals in the *same* Parliament, one in 1643, the other in 1645. But, says the writer of the *Considerations*, "though the names are the same, it is
 " far from being clear, that these latter were the
 " same gentlemen that were expelled in 1642;
 " and as a proof of this (says he,) it appears from
 " the Journal of the 11th August, that they were
 " not only expelled, but at the same time declared disabled to sit any longer as Members during
 " that Parliament."

This will not do. No better proof can, in the nature of the thing, be produced, of an identity of persons at such a distance of time, than the same names appearing recently in the same place, and in the same station. And such a bare possibility as that, of two instances, of two names, applying to two different persons, under such circumstances, amounts almost to an absolute impossibility.

As to the argument from those gentlemen being, by the act of expulsion, disabled to sit any longer as Members during that Parliament, it only

ly makes the cases the stronger in point; because their sitting in spite of such a declaration of disability, is the strongest judgment for its inefficacy. It shall however be shown by and by, that these words *disabled to sit any longer as Members during that Parliament*, were the very *periphrasis* often used for *expel*, as appears from many instances quoted by the writer of the *Considerations* himself: And that they were not always intended as an express disability superadded to the sentence of expulsion.

The second entry cited from the Journal of 22d Jan. 1643, relating to Mr. Holborne, "that he be discharged and disabled for sitting any longer as a Member of this House during this Parliament;" only farther and still more directly proves, that notwithstanding a former expulsion inflicted by a sentence in the same words, he actually had been re-elected and did sit in the same Parliament.

As to the other answer made by the writer of the *Considerations*, that these two gentlemen "had been *perhaps* re-capacitated by a subsequent vote, as it appears the House exercised this power at this time in several other instances;" it is sufficient to reply that there can be no arguing where a *perhaps* is the only evidence founded upon. It is true, the House did assume at that time a power of re-capacitating, as well as of disabling. But that power was still more absurd than the other, if possible, seeing as judges they had no power over their own sentence after it was passed: And their assuming it, is but an additional proof how little regard was paid to law in their proceedings. And if it proves any thing more, it is, that the House would not stand a trial upon an incapacity, inflicted only by their resolutions, when actually called in question by a re-election in the

the teeth thereof. Besides it is utterly inconceivable how a vote of a House of Commons *re-capacitating* a person whom they before had expelled and disabled, could again make him a Member, unless he was re-elected.

The case of Mr. Woolaston, expelled 20th Feb. 1698, is unanswerable; and is only strengthened by the distinctions and evasions with which it is attempted to be answered both by the Author of the *Case* and the writer of the *Considerations*. The facts are undeniable. Mr. Woolaston was expelled. That is the express word of the sentence. He was immediately re-elected, and *sat*. The Author of the *Case* would fain blunt the edge of this authority, by substituting for *expulsion*, the Westminster-Hall term of *amotion*; and by telling us, the House somewhat inaccurately used the word *expel*: And both he and the writer of the *Considerations* dwell upon the cause of the expulsion; that it was not for a crime, but for being concerned as a collector of duties, contrary to an Act of Parliament: Which being but a temporary disqualification, and removed before his re-election, the House could never mean, that the effect of their vote should be *permanent*. He was only (say they) *removed* to carry the law into execution.

But with these gentlemens favour, neither they nor I have a right to argue away a clear *fact* by a supposed intention: Or (to use the words of the writer of the *Considerations*, when answering the argument of *another* on Sir Robert Walpole's Case, he heedlessly replies to himself in this) "there is a fallacy in that argument which draws
"consequences from the act of any court, which
"are directly opposite to, and contradict the
"words of that court, in pronouncing the judgment."
The express word of the Judgment in

Mr. Woolaston's case is *expel*: And that word, according to the gentleman's argument, either implies incapacity in *every* instance, or it does it not in *any*: Because being a *necessary* effect, it must *always* and uniformly be the *same*. But that it does not imply it in Mr. Woolaston's case, these writers themselves labour to prove: And one instance to the contrary is as good as a thousand, to show it is not *necessarily* included in any other: Which at once makes an end of their *necessary* implication.

At the same time when the writer of the *Considerations* argues from the temporary nature of the cause of Mr. Woolaston's expulsion, to exclude the effect of incapacity, as necessarily belonging to it, he should also recollect, that he himself produces as one of the instances for proving that expulsion implies incapacity, the case of Sir John Leeds expelled 10th Feb. 1620, for having sat without taking the oaths required; and expelled for that reason, although he was, as the Journals show, willing then to take the oaths. From which it is evident, that if the *cause of expulsion*, and not the *expulsion* itself, is the ground of incapacity, the instance of Sir John Leeds, was as improper an instance for proving that expulsion implied incapacity, as the argument on Mr. Woolaston's case is unfit to prove that his expulsion was not attended with incapacity. It is therefore a general principle, and not pretended specialties in a case, that must decide upon the effect of expulsion as necessarily implying incapacity.

Parliamentary authorities have also been referred to on the other side, for proving that a person expelled is not eligible into the same House of Commons. The Author of the *Case* has not incumbered his argument for incapacity as implied in expulsion, with authorities of this sort. But his co-adjutor, the writer of the *Considerations*, has given us

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from his *dog ear'd Journals*, a long list of what he calls the *precedents and the express declarations of the law on this head, by the House of Commons, from time to time.*

These writers, however, as before hinted, do not seem to have been perfectly agreed in their ideas upon this part of the subject. The author of the *Case*, in giving us the “ various terms in “ which the sentence of expulsion was expressed “ before the Parliamentary stile had acquired that “ accuracy, which it has since attained”—confines himself to those before mentioned of—*severed* and *cut off*—*removed*—*discharged*—*put out*—Which, he says, are only so many synonymous expressions signifying expulsion: And as his argument is, that incapacity is necessarily implied in expulsion, however expressed, he avoids mentioning instances where particular words were used more directly expressive of an incapacity, or seeming to superadd it to expulsion.

The writer of the *Considerations*, on the other hand, speaking in his own style, applies the term *expel* to all the cases he cites, whatever particular words were used in them; although the word *expel* hardly began to come in use till about the time when his list, exclusive of Sir Robert Walpole's case, ends. And he, nevertheless, chooses instances in which terms not expressive of incapacity or disability have been used; such as *incapable*—*disabled*, &c. because his purpose is to show from *precedents and express declarations of the House, that persons expelled were not eligible.*

To this end, he has taken hold particularly of the word *disable*, which came very often in his way in the precedents he refers to; and has given the term a new coat, cut out of the precision of modern language. *Disable*, as we have distinctly shown, constantly in correct speech, signifies the

same as *incapacitate*: And therefore, this writer, in *shaping* his *Considerations*, has impressed into the service the word as found in the old inaccurate Journals; and will have it to express such an incapacity as he is contending for; or to be an active term inflicting disability by a sentence.

It may, however, be first observed, that these two different plans of the argument in the *Case*, and in the *Considerations*, cut one another. For if, according to the Author of the *Case*, all the different terms, in which expulsion has been variously expressed, are synonymous, and incapacity always the necessary effect of it, however expressed, then those cases cited by the writer of the *Considerations*, in which words more directly expressive of incapacity and disability are used, being interpreted by this general rule, fall to have no particular import or energy ascribed to them.

On the other hand, if, with the writer of the *Considerations*, we understand a particular effect to lie in the terms used in the cases cited by him, it must follow, that where terms of that import are not used, the proof of the doctrine, that incapacity is necessarily implied in all expulsions, fails, or is considerably weakened. Perhaps too, from comparing the instances in which the more simple words, *cut off*, *remove*, *discharge*, &c. mentioned by the Author of the *Case*, are used, with those instances cited in the *Considerations*, in which the terms more emphatical of disability are found, it may appear, that the whole are only one continued proof of the antient inaccuracy in the Parliamentary style; and that the diversity of expressions is too weak a foundation to build upon it precedents of authority, or not strong enough to be construed into express declarations of the Law, by the House of Commons.

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It ought also to be attended to, that the writer of the *Considerations*, has not given the exact words of the Journals, in citing the cases founded upon by him; although it would seem from the manner of the references, that he had done so. And 'tis apprehended nothing more than fairly transcribing the words of the Journals, will be necessary to answer some part of the arguments he has grounded on the cases, of which he has given an account.

But, more particularly to consider the list of cases cited by the writer of the *Considerations*; there are fourteen, besides Sir Robert Walpole's: And in two of them, (I now speak from the Journals themselves, not from the account given in the *Considerations*) viz. No. 13, Mr. *Sackville*, and No. 14, Sir *Robert Cann*, the word used is *expel*. These cases, therefore, explain nothing, but must be expounded by some others. The manner, however, in which these two cases are reported in the *Considerations*, makes it necessary to give the true state of them.

In Mr. *Sackville's* case, expelled March 25, 1679, this writer has added to the Journals from another book, and instead of transcribing them, he tells us "it appears from Grey's debates, on the question, to address the King to remove Sackville from all his employments; that no man had an idea that he could by law be returned back upon them again. Serjeant Maynard says, put him into such a condition, that Cates and Bedlow may have remedy against him, and that is by expelling him the House. Short time for remedy, (says the writer of the *Considerations*) if the borough of East-Grinstead, for which Mr. Sackville then served, and which I believe, was pretty much at his command, could have returned him again a Member of Parliament in eight and forty hours." It

It is enough to observe upon this, that the Journals, and not Mr. Gray's Debates, are the authority : And from the sentence of the House, and not from Mr. Serjeant Maynard's speech, is the sense of Parliament to be gathered. But Grey's Debates misplace any thing that was said upon expulsion, or the effect of it, when they place it in a debate upon the question for an address to remove from employments after the expulsion was voted. And it seems as if Mr. Serjeant Maynard thought Mr. Sackville's employments protected him from the remedy, which he wished Oates and Bedlow to have. All in the Journals, is "*Ordered*, That Mr. Edward Sackville be expelled this House."

"*Resolved*, That an humble address be made to his Majesty—for removing Mr. Edward Sackville, from all publick employments and trusts." The Journals therefore are no foundation for the comment in the *Considerations*.

Sir Robert Cann's case, (expelled October 28, 1680) the writer of the *Considerations* surely relates from some other book than the Journals; for he has not given us one word that is there. He puts this sentence into the mouth of the Speaker, as delivered by him in pronouncing judgment :—" That you be committed to the Tower, and you are actually cut off from being a Member of this House, and you are no more to be a Member of Parliament." The words in the Journals, after an address committing Sir Robert to the Tower, are—" *Ordered*, That Sir Robert Cann be expelled this House."

" And then he was brought to the bar of the House, and upon his knees received the judgment of the House for his expulsion from this House, and commitment to the Tower." But the writer of the *Considerations* had an emphasis to lay

lay on the words, *and you are no more to be a Member of Parliament*, therefore he makes a Journal of his own to introduce them.

In two more of the cases, we find the words, *unworthy*, and *not fit*.

Sir Edmund Sawyer's case is one, marked No. 3, in the *Considerations*. He was expelled June 21, 1628; and in the Journals the case stands thus. "Upon question, Sir Edward Sawyer, for
" this offence to the House—to be committed
" to the Tower, and to be turned out of the
" House, and a new writ to issue for a choice in
" his place." This is the sentence of expulsion,
—then follows, "2dly, to be committed to
" the Tower during the pleasure of the House.
" 3dly, The House declareth him to be unwor-
" thy ever to sit as a Member of this House."

This last article, which is clearly no part of the sentence of expulsion, but super-added thereto; so far as regards the word *unworthy*, is merely synonymous with the word *unfit*, which is found in other cases, where it shall be considered. In as far as the article imports a declaration of *perpetual* exclusion from the House, it belongs to a particular class of the cases under which the observation proper to be made upon it, will be met with.

The cases of four monopolists (No. 4, in the *Considerations*) expelled Jan. 21, 1640, are thus expressed in the Journals,—“Resolved upon
" the question, that Mr. William Sandys—is
" not fit, nor ought to sit as a Member of the
" House this Parliament, and that a warrant issue
" forth—for a new writ, for electing of ano-
" ther to serve—in his stead.”

“*Resolved*,—That Mr. Jo. Jacob,—ought
" not to sit as a Member of the House this Parli-
" ment, and that a warrant issue forth for a new
" writ,

“ writ, for electing of another to serve—in his
 “ stead this Parliament.

“ *Resolved*,—That Mr. Thomas Webb, ought
 “ not to sit in this House, and that a warrant issue
 “ forth for a new writ for electing of another to
 “ serve in his stead this Parliament.”

“ *Resolved*,—That Mr. Edmund Windham
 “ —ought not to sit as a Member in this House
 “ this Parliament, and that a warrant issue forth
 “ for a new writ, for electing of another burgess
 “ to serve in his stead this Parliament.”

The words used in these four instances amount, at the highest, to no more than an expulsion or exclusion from the then present Parliament, which pronounced the judgment ; and for the true meaning and import of *that*, we must refer to a general observation to be presently submitted.

There remains then ten of the fourteen cases, in all of which, the words, *incapable* or *disabled*, or both, are introduced in one manner or another : And it is material to have the cases before us, in their own words, as they stand in the Journals ; for a good deal depends upon an accurate attention to the precise form of expression.

In Mr. Hall's case, (No. 1, in the *Considerations*) expelled Feb. 14, 1580 ; after different resolutions for fine, imprisonment, &c. the sentence of expulsion is in the Journals thus—“ *Resolved*,
 “ That the said Mr. Hall should presently be severed and cut off from being a Member of this
 “ House any more, during the continuance of this
 “ present Parliament, and that Mr. Speaker—
 “ should direct his warrant—for a writ—for
 “ a new burgess, in the lieu and stead of the said
 “ Arthur Hall, so as before *disabled* to be any
 “ longer a Member of this House.”

The case of Sir John Leeds, (in No. 2, of the *Considerations*) expelled Feb. 10, 1620, cannot at
 all

all be understood from the *Considerations*. In the Journals it is not very intelligible, but it is as follows.

——— “ *Resolved*, Sir John Leeds, *incapable of being a Member of this House, as if never returned.*” Upon these words, and these only, rests the expulsion.——Then proceeds the Journal.

“ Mr. Crew, for Sir John Leeds——No question but he is incapable.” “ 2. He is to be punished.”

“ Mr. Hackwyll——to have him removed ; a writ for a new choice, and to punish him by sending him to the Tower.”

“ Sir John Moore——to have no question made but where it is questioned.”

“ Mr. Secretary——The fault great, especially because of last Parliament. To order he shall be *discharged now, and to serve no more this Parliament.*”

“ Sir John Leeds brought to the bar, confesseth, he was of the House last meeting in Parliament ; and that he hath sat in this Parliament in the House, and hath not taken the oaths.”

“ Mr. Thomas Fanshaw——that he must be punished, as one that hath come into the House, not being chosen

“ Sir Edward Sandes——to pay the Serjeant his fees, and no farther punishment, because but negligence, no presumption ; and is willing to take the oath.”

“ Mr. Chidleigh——to have an order to *disable him for this Parliament.*” “ A warrant for a new writ in his room.”

Mr. Taylor’s case, (No. 5, in the *Considerations*) expelled May 27, 1641, is thus :

“ *Resolved*——That Mr. William Taylor shall be *expelled this House, be made incapable of ever being a Member of this House, and shall be forth-*
“ with

“ with committed a prisoner to the Tower, &c.”

“ He was called to the bar, and there kneeling,
“ Mr. Speaker pronounced sentence against him
“ accordingly.”

“ *Ordered*, That Mr. Speaker shall issue forth
“ his warrant—for electing of a Burgess to serve
“ in the stead of Mr. William Taylor, formerly
“ returned to serve—and since, by sentence of
“ the House, *expelled* the House.”

Mr. Benson's case, (No. 6, in the *Considerations*)
expelled, Nov. 2, 1641, is thus entered in the
Journals.

“ *Resolved*, That Mr. H. Benson, is *unworthy*
“ *and unfit to be a Member* of this House; and shall
“ *fit no longer as a Member of this House.*”

“ *Resolved*, Mr. Benson shall be forthwith sent
“ for as a delinquent.”

“ *Resolved*—That Mr. Speaker shall issue
“ forth his warrant—for electing of another Bur-
“ gess, to serve in his stead.”

“ *Resolved*—That the Households, Mr. Ben-
“ son *unfit and incapable ever to sit in Parliament,*
“ *or to be a Member of this House hereafter.*”

Sir Edward Deering's case, (No. 7, in the *Con-
siderations*) expelled Feb. 2, 1641.

After a resolution that the book, the writing of
which was Sir Edward's offence, being a collec-
tion of his own speeches in matters of Religion,
was against the honour and privilege of the House,
and scandalous to the House; and ordering it to
be burnt by the hands of the hangman: It is

“ *Resolved*, That Sir Edward Deering shall be
“ *disabled* to sit as a Member of this House, du-
“ ring this Parliament.”—And farther,

“ *Resolved*, That Mr. Speaker shall issue forth
“ his warrant—for a new writ for the election
“ of a Knight, to serve for the county of Kent,

“ in the room and place of Sir Edward Deering,
 “ *thus disabled.*”

And after a resolution for committing him to the Tower, &c. the Journals inform us, he was brought to the bar, and Mr. Speaker pronounced the sentence against him and his book accordingly.

Mr. Trelawney's case, (No. 8, in the *Considerations*) expelled March 9, 1641, is thus :

“ *Resolved*, that Mr. Trelawney shall be forth-
 “ with *put out of the House, and disabled for sitting*
 “ *as a Member of this House, during this Parlia-*
 “ *ment.*”

“ Mr. Trelawney was called down to the bar,
 “ and Mr. Speaker pronounced the sentence against
 “ him accordingly.”

“ *Resolved*, That Mr. Speaker shall issue his
 “ warrant—for a new writ, for electing ano-
 “ ther Burgeſs to ſerve—in the ſtead of Mr.
 “ Robert Trelawney, formerly choſen a Burgeſs,
 “ and ſince *disabled* by the vote of this Houſe.”

The caſe of Mr. Long and Mr. Hook, (No. 9, in the *Considerations*) expelled May 12, 1642, is as follows :

“ *Resolved*, That Mr. Long and Mr. Hook are
 “ *not fit to ſit any longer in the Houſe as Members of*
 “ *Parliament.*”

“ *Resolved*, That Mr. Speaker ſhall ſend his
 “ warrant—for the iſſuing of a writ for electing
 “ of other Burgeſſes to ſerve—in the ſtead of
 “ Mr. Long and Mr. Hook, ſo *disabled* as afore-
 “ ſaid.”

Serjeant Hyde's caſe, (No. 10, in the *Considerations*) expelled Auguſt 4, 1642, is thus :

“ *Resolved*, That Serjeant Hyde ſhall be *dis-*
 “ *abled* to ſerve any longer in this Parliament, as
 “ a Member of this Houſe.”

N. B.

N. B. *Vide* for the warrant for a new writ after the next case, as under.

Sir R. Hopton and Mr. Thomas Smith's case, (No. 11, in the *Considerations*) expelled August 5, 1642, is thus :

" *Resolved*,—That Sir Ralph Hopton shall be *disabled* to sit as a Member of this House during this Parliament."

" *Resolved*, That Mr. Thomas Smith shall be *disabled* to sit as a Member of this House during this Parliament."

" *Resolved*, That new writs shall be sent for new elections of Burgesses—in the place and stead of Sir Ralph Hopton, and Mr. Thomas Smith, and Mr. Serjeant Hyde, *disabled*, by judgment of this House, to sit any longer as Members of this Parliament."

Sir Thomas Strickland's case, (No. 12, in the *Considerations*) expelled March 6, 1676, is particular, and is indistinctly reported in the *Considerations*.

" Mr. Speaker acquainted the House, that he had writ to Sir Thomas Strickland, informing him, that the record of his conviction of recusancy, had been read in the House, and that the House had given him that notice, that he might offer what he could, why a writ should not issue for electing a Member to serve in his place."

Sir Thomas's answer was produced and read, Upon the debate of which matter, *Resolved*, That whereas it doth appear to this House, that Sir Thomas Strickland, a Member of this House is convicted of Popish recusancy, that he be from henceforth *disabled from being any longer a Member of this House*."

" *Ordered*, That Mr. Speaker do issue out his warrant, to make out a new writ for the elect-

“ing of a Knight of the shire, to serve in this
 “present Parliament—in the room of the said
 “Sir Thomas Strickland.”

Upon this case of Sir Thomas Strickland, the writer of the *Considerations*, makes this very particular observation, “that the disabling of him, “was not done by virtue of any Act of Parliament then in force, for the first law (says he) “which passed disabling Papists from sitting in either House of Parliament, was not made ‘till “1678, 30 Charles II.” One could not have expected any thing so very unguarded from a writer of *constitutional knowledge*. Does the gentleman not know that a *Popish Recusant convict* incurs a *præmunire* by the statute of Elizabeth; that is, he is out of the King’s protection, forfeits his lands and goods, and to be imprisoned during the King’s pleasure. If that is not a legal disability, I know not what is. The Act of Parliament in 1678, referred to, and others of that sort, which introduce tests of the Protestant religion, exclude Papists; but Recusants convict are more than disabled, they are punishable with the highest pains.

We have given the cases fairly, and at full length, that it may from themselves appear how far the observations we have to offer upon them, are well founded or not: And we hope the words used in the different cases, will have made such an impression upon the careful and attentive reader, that he may be ready to meet, or rather have anticipated what we are to say.

In the first place, upon receiving the cases, it is impossible not to perceive a manifest inaccuracy of expression, and an incorrectness in the application of it, which runs through all, and is remarkable in almost every one of them: Much more than sufficient to justify the charge of this
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fort, the Author of the *Case* himself would not avoid making. And, amongst such a variety of words, not only in the immaterial parts, but where the terms might, and are supposed to have been, of some particularly significant import, it cannot be but the diversity was in a very great degree owing to the inattention, and probably have proceeded from the whim and caprice of those whose diction they were.

It therefore well deserves to be premised, as a general remark, that it must always be very dangerous to build *Doctrine* upon loose, indigested, ill-conceived, and ill-adapted expressions; especially when such doctrine was not the thing in view, to be considered or established.

Now in all those cases, expulsion was the object; and the effect of expulsion was not the thing in contemplation. No question could arise upon incapacity as the effect of expulsion, but on a re-election of the person expelled: And of such cases, Sir Robert Walpole's, and the present, are the only two that have occurred: Which makes the one as a precedent, and the other as a confirmation, of infinite importance. All the other cases, if duly weighed, can be of no moment to the point now in debate, which was never once stirred, or made a question of in any of them.

Indeed, in the nature of things, cases *merely of expulsion* (and such are all the old cases) can furnish no *precedents*, nor with any propriety be produced as *express declarations of the Law*, as to the necessary or implied effect of expulsion. That belongs to quite another cause; unless there can be precedents by decisions where there was no question, or determinations without a cause, which is absurd. Such cases, much more mere words or phraseology found in them, are not even so good as
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extrajudicial opinions: And these are not only incompetent in matters of legal trial, but of all others are the most dangerous and destructive method of forestalling justice.

To resort therefore to so unavailable authorities on the present occasion, is only to prove that the point is yet new and entire, unless so far as prejudicated by Sir Robert Walpole's case, and consequently that it ought to be judged upon its own strength and true principles; Sir Robert Walpole's case being allowed its just weight as a single precedent, or an ambiguous and disputed authority.

2dly. Although expulsion was the object of all those cases, and the thing to which, in a natural course of proceeding, they ought to have been confined, both in form and in substance; yet, as it cannot escape observation, that there are words in the cases, which on their proper signification, express or import disability and incapacity, the consideration of these must not be avoided: And they present themselves under different views.

1st. As constituting the act of expulsion, or as coupled with it in the sentence; which we shall postpone for a moment to join it with its proper yoke-fellow.

2dly. As super-additions to the expulsion; importing, or seeming to import a direct infliction of incapacity: Which we must refer to the other branch of the question; under which incapacity by resolution is to be considered.

3dly. Where the incapacity is by the words restrained to that present Parliament by which the expulsion is pronounced: Which we shall consider together with the first mentioned. And

Lastly, Incapacity by the words, made perpetual and for ever to exclude from future Parliaments.

To dispatch this last of *perpetual* incapacity first: Forlorn and abandoned as it is, even by the advocates for incapacity, who cannot help admitting that in the *better* opinion, this is not to be effected by less than an Act of Parliament; we have nothing to do but to consign it to that perpetual oblivion and proscription to which its own illegality has doomed it: Or rather, should I say, to point it out to publick view as a proof of that *grasping* incident to all power, which the Author of the *Case* animadverted upon in the House of Lords for invading the jurisdiction of the Commons; and as an evidence that the House of Commons itself has, in one case at least, often done what it could neither lawfully do, nor make lawful by doing it often.

Let this monument therefore of excess, instead of being blotted out of the books which is its own desert, for ever stand as a monitor to hedge in the way of Parliament itself, and a perpetual beacon to warn even the wisdom of the nation, not to *commit* their authority by exceeding their power.

The only other proper use to be made of it upon this occasion, is to prove, what it undeniably does, that the cases from the Journals so much relied upon in this question, are no better an authority to establish it as the Law of Parliament, that *any* incapacity is the effect of expulsion, than they are, that a *perpetual* incapacity follows it, or may, by the power of the House of Commons, be annexed to it. The cases therefore, are in reality no authority at all upon the point, but must, as an argument which proves too much, be allowed to prove nothing. For it is impossible to say, that the same resolutions of the House of Commons, shall be a better authority for the shorter, than they are for the longer incapacity; if the whole rests only upon the authority of the resolution: And if
it

it does not, the cases are out of the question, and principles must decide it.

To return, however, to the first and third of the views under which the cases present to us words importing or seeming to import disability and incapacity; namely, as constituting the act of expulsion, or coupled with it in the sentence, and restrained by the words themselves to that parliament, by which the expulsion is pronounced; the following observations occur thereupon.

First, to recur to what was before hinted, one of two things must be admitted. Either all expulsions are of the same effect, however expressed; which is contended indeed both by the Author of the *Case*, and the writer of the *Considerations*: And if so, there can be no *specific* virtue in any words of disability and incapacity found in the cases. Or there is a virtue and emphatical signification in those words; and then there must be *degrees* in the effect of expulsions: Which, if acceded to, we cannot stir a step in this ground without impeaching the doctrine of *necessary* implication of incapacity in all expulsions.

This other corollary also follows; that the degree of effect in the expulsion, must stand upon each particular case; and the special penning of the sentence be the measure of restraining or extending the consequences. But leaving the gentlemen to solve this dilemma to their own satisfaction, we have a justice to render to the cases themselves. And

In the next place, it is obvious, that in the cases of most importance to this branch of the argument, the very act of expulsion, and its whole essence, is constituted solely by those very words which are expressive of, or seem to import disability and incapacity. Thus the only sentence of expulsion pronounced upon Sir Edward Deering,
Serjeant

Serjeant Hyde, Sir Ralph Hopton, Mr. Thomas Smith, and Sir Thomas Strickland, is in these words—*shall be disabled to serve any longer in this Parliament as a Member of this House; or shall be disabled to sit as a Member of this House during this Parliament—or that he be disabled from being any longer a Member of this House.* And in Mr. Trelawney's case, which is of an older date, the sentence is the same, only a little longer—*shall be forthwith put out of the House, and disabled from sitting as a Member of this House during this Parliament.*

The observation strikes at first view, that in these cases the word *disabled*, however inaccurately, was used merely as the word *expel* is now; only, that being itself not such a substantive term, it required to have other words added to it, to compleat the sense—such as, *to serve any longer, or to sit—or, from being any longer a Member, &c.* it does not appear to have been so much as designed or intended to convey any emphatical signification, or to impress an active virtue of incapacity, otherwise than as it may be said, as it now is, of the word *expel*, that it included incapacity.

And having before us such apparent proofs of the inaccuracy of Parliamentary stile in those times, it were in vain to attempt accounting for the improper use of words, or to torture them into, or out of, particular significations. The visible inaccuracy itself, is a fair solution, and none other need be sought after. Nor is the improper use of the word *disable*, peculiar to the antient Journals in the case of expulsions only. It was the term used to express the declining of the chair, the necessity of which custom has down to this day imposed as a law of modesty upon the person chosen to the office of speaker. It is said, “standing in his place he *disabled* himself to undergo the

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“ weighty

“ weighty charge—and that being denied he
 “ prayed leave to *disable* himself to the King—
 “ and he did *disable* himself to the King, &c.”

Multiplying words would but darken our ideas on this head. A plain common reader comparing the cases, must at once see, that of old, *disabled to sit any longer as a Member of this House*, was perfectly synonymous with the modern expression, *be expelled this House*; by which the person effectually and instantly ceases to be a Member, and becomes *unable*, or has no right to sit any longer in the House.

What else could it mean in the case of Sir Thomas Strickland, who was disabled upon a conviction of Popish Recusancy? If the conviction, which was the cause of the disability, had been legally removed, as undoubtedly it was capable of being; can it be said he could not have been again chosen a Member of Parliament? Yet the words cannot have a different signification in his case, or in any one of the other cases, for they are perfectly the same even to a tittle of grammar.

This is yet more evident, if possible, from the use of the word *disabled*, as introduced into some of the cases, merely as a *relative*, to signify what, in a former part, had been expressed in different, but synonymous words; as the very notion of a relative implies.

Thus the sentence against Mr. Hall, is expressed by the words *severed and cut off from being a Member*; and the writ is ordered to be issued instead of Mr. Hall, *so as before disabled*. Very probably the origin of this word *disable* in the actual sentence of expulsion in after times, was its having been used so far back as that very antient case of Mr. Hall's in the way of a relative, as synonymous with *severing* and *cutting off*, by which the expulsion was then expressed.

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In the case of Mr. Long and Mr. Hook, the sentence is, that they are *not fit to sit any longer in the House*; and the writs go, (just as in Mr. Hall's case,) "instead of Mr. Long and Mr. Hook *so disabled as aforesaid*;" though in the sentences of expulsion, the word *disable* is not used. In those cases the form of words used in issuing the writ, is exactly the same as in the cases of Sir Edward Deering, Mr. Trelawney, Serjeant Hyde, Sir Ralph Hopton, and Mr. Smith; where the sentence itself is expressed by the word *disabled*.

This shows the *synonymy* there was understood to be in all the different expressions used in the sentences of expulsion, and clearly evinces, that there was no particular emphasis or effect intended by the word *disabled*; but that it was, however inaccurately according to the modern precision of terms, used merely to express expulsion or exclusion from the House.

Nothing more than the same observation is necessary upon the word *incapable*, used in some of the cases. Thus Mr. Taylor's sentence is, that he shall be expelled this House, be made *incapable of ever being a Member of this House*: Where, were it not for the quality of perpetual, expressed by the word *ever*, there could be no doubt, but the word *incapable* was used merely as an *expletive*, and explanatory of *expelled*. And that, notwithstanding the word *ever*, there was no perpetuity of incapacity here meant, we shall see from another observation to be presently made.

The intention of the word *incapable*, is farther illustrated by the case of Sir John Leeds, which the writer of the *Considerations* has singled out as the ground of a particular observation. The only sentence of expulsion against Sir John is in these words—"Resolved, Sir Jo. Leeds *incapable of being a Member of this House*, as if never return-

“ed,” which is so very inaccurate, as not to be grammar. His fault was, not taking the oath required: And though that certainly rendered him incapable of sitting, and might, notwithstanding his offer then to take the oath, and that as one of the Members said, his not having done it before was negligence, not presumption, provoke the House to punish him by an expulsion for having presumed to sit without qualifying; yet surely the *incapacity* was not indelible: Nor could it, in its own nature, extend to affect his future eligibility. Indeed the sentence itself restrains the incapacity, *to his being a Member of the House*; that is, one would think, only to his continuing to sit; and not improperly puts it on the same footing, as if he had never been returned.

According to the Judaical interpretation of words now insisted upon, it having been resolved, that Sir John was incapable of being a Member, it might be construed to mean that he was incapable of ever being a Member of the House. But without such a construction, still he was *expelled*, for he was put out of the House, whatever form of words was used to do it: Therefore if expulsion included incapacity, he was as incapable for that Parliament as any other expelled Member could be; although his incapacity, like Mr. Woolaston's, was so very *temporary*, and so far from being *permanent*.

If Sir John Leeds's expulsion inferred incapacity, it will indeed demonstrate the malignant effect of any kind of expulsion, and prove the danger of tampering with effects by implication. But it will be impossible upon the same principles, to save Mr. Woolaston's case from the effect, notwithstanding all the laboured distinctions of temporary and permanent disqualifications. For the *venemous* word *expel*, was used in Mr. Woolaston's case,
however

however inaccurately, as is now said, and it is only the word *incapable* that is in the sentence against Sir John Leeds; which, indeed, was as efficacious as *disable* in the old times.

The writer of the *Considerations* makes a particular use of some things mentioned in the Journals to have dropt from Members in the debate upon this case of Sir John Leeds; the particulars of which are taken down according to the fashion of making up Journals in those days, now happily abolished, to the comfort of all Members of Parliament. He quotes the words of Mr. Secretary, "order he shall be discharged now, and "to serve no more." And Mr. Chidley's motion "for an order to *disable* him for this Parliament." Then (says this writer,) "the House did not come "into this proposition, but only ordered a new "writ to be issued. But this debate (adds he) "shows what sense the principal Members entertained at that time of the power of the House, "with respect to the *disabling their Members* "during the subsisting Parliament."

It is not to answer this notion of the power of the House to *disable* by resolution, that I have given these words of the *Considerations* a place here. We shall meet with that doctrine in its proper place to which we have reserved what is to be said upon it. But I have made the citation for the sake of an observation proper to the present argument, and to show that the writer of the *Considerations*, mistook the case of Sir John Leeds, as he has done others of those quoted by him, when he laid hold of the words of the Secretary and Mr. Chidley, as a proof of the emphatical signification of the term *disable*.

In this view it was, I took the trouble to give a full extract of Sir John Leeds's case with the others, instead of the mutilated edition exhibited in the
Considerations.

Considerations. And from this case particularly it does, I think, appear, (quite in opposition to this writer's opinion of it) that *disabling* for this Parliament, was merely a mode of expressing, a simple expulsion at that time of day. In this sense clearly Mr. Chidley used the words. For it is evident from the full state of the case, that the debate among the Members was, whether or not Sir John Leeds should be put out of the House, or should be discharged then and to serve no more that Parliament, which was Mr. Secretary's motion—Or, as Mr. Chidley expressed it, should be disabled for that Parliament: Or if he should be allowed, on taking the oath, to continue in his seat, and be no farther punished than by paying his fees to the Serjeant; which was what Sir Edward Sandys proposed, who mentioned as an excuse for Sir John, that it was negligence, and not presumption, he had been guilty of.

It is a mistake to say that the House did not come into the motion made by the Secretary or Mr. Chidley, for Sir John Leeds actually suffered all they intended. He was put out of the House, which was all that *disabling* him, or *discharging* him then to serve no more in that Parliament meant: And so the very next words entered in the Journal, after those that fell from Mr. Chidley, are “a new writ in his room;” that being the laconic stile of the day.

This is explained by looking back to the resolution, that Sir John was *incapable of being a Member as if never returned*. And though it may appear strange, that after a sentence of expulsion, which the above resolution was, and the only thing there was for it, there should be such a debate and such motions as the Secretary and Mr. Chidley made. The fact however is, it is that the entries in the Journals stand so: Neither are the motions made

by Mr. Secretary and Mr. Chidley the only ones that are misplaced, for Mr. Hackwell's and Mr. Crew's speeches to the same purpose are entered after the resolution that Sir John was incapable. The Motion by Sir John's own friend, that he should be no farther punished than by paying his fees, is also placed after the resolution of the House by which Sir John was put out of it. Nay it is after the resolution is recorded, that Sir John Leeds, the culprit, is introduced as brought to the bar, and making confession of the fact upon which the sentence is grounded.

The solution of the whole, lies in the extreme inaccuracy of the Journals. But the essence of the case consists in this, and there the Journal is clear, that there was a resolution that Sir John was incapable of being a Member, as if never returned; and that upon that resolution only the order for a new writ proceeded: Just as in some other of the cases, the like order proceeds upon a resolution, that the person is unworthy and unfit to be a Member of the House, and shall sit no longer, &c. If the resolution had been in the other words *to discharge him, or to disable him, &c.* the effect had been the same and in no degree different, as we see from the other Cases in which such words were used.

If there is any weight in what has been said upon the words expressive of incapacity or disability, little need be added upon those which are urged as signifying the extent or endurance of the alledged incapacity making it to be for the *subsisting* Parliament. For these words are clearly necessary, as has been observed, to compleat the sense of the terms *disable, &c.* so as altogether to compose an expulsion or exclusion: And if there is no emphasis in the main terms, the expletive words cannot infuse it.

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There is one thing farther to be observed on this matter, and it will go far to explain the true meaning of those antient sentences of expulsion. The Author of the *Case* has himself paved the way for the observation we are going to make. He mentions the distinction in former times between a suspension and an expulsion. This serves to unravel all the words of disability and endurance. For it seems to be pretty plain that both sorts of expressions were used only to distinguish an expulsion or *absolute amputation from a temporary suspension*. So when the person was to be expelled, the form used was—that he be *severed and cut off—discharged—removed—*or *disabled* from being a Member—or that he shall be *no longer a Member* of the House *this Parliament*, which really amounted to no more, in the stile of those times, than—that he is *not suspended* for a time, but is *expelled* or *excluded* from being a Member of the Parliament.

The same observation applies to those other words by which some of the sentences of expulsion are expressed—That one is unworthy or unfit to be a member of *this House*, or of *this Parliament*. Perhaps it would not be stretching too far to say, that the words strictly expressive even of a *perpetuity*, had no other meaning than to distinguish from a suspension. For it is hard to conceive that any House of Commons could ever entertain an idea, so confessedly beyond their power, as that of prescribing to future Parliaments, or binding them by the imposition of a perpetual incapacity.

This very consideration inclines me to make no great account of the declarations of incapacity superadded by separate resolutions, in some of the cases, to the actual sentence of expulsion; upon which an argument is now built as to the sense of Parliament of their power to disable. These sort of resolutions are at best but opinions, not judicial sentences

sentences of the House, but rather in the way of direction to the Electors: And to them may be applied the words of Sir Edward Coke as to the objection of *nonresfancy* to the election of a Knight of a Shire, in the case of Sir Thomas Bowman 5th Feb. 1620—"The Law" (says he) "distinguisheth matters in statutes *directory* and *conclusory*. Direction but matter of order which maketh nothing void: Matter of substance only doth it. Scarce any well chosen, if matter of order shall overthrow it. Hands and seals of all Electors should be put to their indentures, which never done." If it could be thus argued upon a statute, which is *Law*; how much more is it applicable to a *directory* opinion of the House of Commons which is *not Law*.

Thus I have offered what occurred to me as a fair exposition and argument upon those old cases which have been cited as precedents for the force of the term *expulsion*. Every one will judge for himself upon the cases. For my part, I am very free to confess, that if those cases were ten times stronger than I can discover them to be, they would not carry away my judgment upon such a point as that now in debate. My reasons are two.

1st. The whole cases are such a mass of inaccuracy, and not being *ex professo* upon the point now agitated, which could only be tried in a course of judicial proceeding upon the re-election of a person expelled, and pretended to be thereby *disabled*: That I cannot consent to set up such cases as a standard of the constitution, much less to set them up to pull it down. Cases in 1641 and 1642, which most of those cited are; — in the Parliament that totally subverted the constitution, to me are not cases of great authority.

The Journals show that on the very day and date of some of those cases, the King and the Par-

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liament were engaged in some of their fiercest contests. Sir Edward Deering was expelled for publishing his own Speeches in Parliament, on the day that the House petitioned the King to put the Tower of London, the forts, and the whole militia of the kingdom into hands recommended by Parliament. The constitution was not then *entire*.—The very cause of some of the expulsions was the conduct of the Members in the disputes with the King.

The writer of the *Considerations* himself stops short in his list, because he admits “ it may not “ be thought fair to look into those times for “ precedents of the constitutional powers of any “ branch of the legislature.” And he only answers the objection by appealing to the revered names of Pym, Hamden, Holles and Glyn, who were the leading Members of the House of Commons at the time of the cases cited by him.

I honour those patriots as much as any man can do: And for constitutional principles I resort with pleasure to some of the Parliamentary remonstrances, in which they took such a share. But in things that touched persons, I am jealous of the heat of the times; for the same reason that I look with a watchful eye upon the measures actually pursued with regard to the King: Some of which indisputably, though perhaps necessarily, invaded the acknowledged prerogative of the crown. That, divesting the King of the martial power, was one. And the petition for it, voted that very day Sir Edward Deering was expelled, was presented by Mr. Pym.

These great men were warmed; no wonder! And the *salient* acts of men into which passion and party will enter, are not like their deliberate digested works, in which they pledged themselves to the present and to future ages. Not to mention that

the writer of the *Considerations* cannot assure us what part Mr. Pym, Mr. Hamden and those other constitutional patriots, with whose authority he would sanctify all the disabling expulsions, did or did not take in them : or whether it was their opinion that prevailed, and not that of a more violent, and less enlightened majority, to which they were obliged to submit.

Over and above all this, there is another reason, which I hope will never yield to any thing. Precedents I can submit to, that explain, not that destroy the law. To such, even I do not object, as by force of time have made or added to the Law in matters arbitrary and indifferent, or where there is no Law. But precedents that strive with the fundamentals of the constitution, which is the only pillar that can sustain the Law itself ; be the times or the number of such precedents what they may — *These* I trust shall never shake the stately fabrick of this august constitution, or loosen the least pin of the sacred building. And in that light do I see every precedent that invades the COMMON RIGHT of the subject ; in which all Englishmen have a natural inheritance, the descent of which, I hope, no time, nor any power, ever will be able to cut off from posterity, for whom, as well as for us, our ancestors redeemed it with their blood.

The only case cited that remains untouched is that of Sir Robert Walpole, which merited a place by itself. The resolution against Sir Robert, the Author of the *Case* has quoted in a most unfair manner : And a worse sign there cannot be of a writer's argument than his being afraid to look full in the face the best authority on his own side. He leaves out one half of the accumulated grounds upon which the House of Commons resolved that Mr. Walpole was incapable of being elected. His

reason was, that expulsion alone might appear to be the cause: Whereas, even that House of Commons took to their aid, the pretended corruption and breach of public trust, which, for ought we know, might be the ground of incapacity most relied upon. For there is some reason to say that breach of trust, by mere operation of Law, disables from holding a place of trust, as perjury, in the nature of the thing, and by the operation of Law, necessarily infers intestability. The very penning of the sentence against Sir Robert gives countenance to this construction of it.

The writers on the other side labour hard to find a reason why, if Mr. Walpole was, *by Law*, incapable, Mr. Taylor was not declared duly elected, as Mr. Lutterel has been on the same ground. They tell us the equity of the House of Commons would not suffer them to take advantage of the strict rule of Law, *ignorantia juris non excusat*.

This I both understand and approve. But how could there be an ignorance of a Law, which, if we give credit to the writer of the *Considerations*, and weight to his list of fourteen *precedents*, and *express declarations of the Law on this Head by the House of Commons from time to time*, was so universally known a hundred years before? The single resolution in Mr. Walpole's case, or that in the Middlesex election added, could not better notify this Law of incapacity than a train of precedents and express declarations down from 1680, where the writer of the *Considerations* begins his list. And if these manifold precedents and express declarations had not notified it, it only could be, because they were considered to be no precedents at all. With what reason then, are they produced as precedents at this day? If, notwithstanding such a multitude of express declarations, the Law really was not known at the time of Sir Robert Walpole's

Walpole's case, where was the Law itself at that time? For promulgation is essential to all Law, and a Law not promulged, is the same as a Law not made.

The truth is, Sir Robert Walpole's case first produced this Law of expulsion-incapacity, and like the daughter of Jupiter's brain, it was born at full stature and in compleat armour, fit for immediate execution, more a goddess of war than of wisdom. But resembling the false Deity in her celibacy too, not having been married to the constitution, it could have no legitimate offspring, though such another occasion was very fit to bring forth a second brat of the same spurious breed.

The thing then is reduced to this, that in spite of all the old precedents, now so much insisted upon, it was the resolution against Sir Robert Walpole, which both made and promulged this Law; and upon that case alone, did it stand before the late determination.

I must therefore beg pardon to treat that precedent as I think it deserves. It is a single precedent, and, I believe, in point of Law, a single precedent is of no great authority. 'Tis the precedent of times I am not much in fancy with; of a House of Commons led by a Tory Ministry, the enemies of the House of Hanover, to whose malice and wicked designs against the liberties of this country, Sir Robert Walpole was, on account of his opposite attachments, sacrificed; that the revolution-settlement of the Crown which those traitorous enemies of their Country were meditating to overthrow, might not have the support he, as an able whig Member of Parliament, was capable of giving it. Such a precedent, it is a shame even to mention in the days of a Prince of the House of Brunswick. It were hardly more preposterous to produce a decision of the Star Chamber,

as an authority in a question of liberty. The votes of the House of Commons, by which in the days of the perversion of the Queen's reign, the best friends of the Protestant succession were proscribed as enemies to their Country, might with equal reason be held up to George the Third as an object of admiration, or a fit pattern to imitate.

But this case of Sir Robert Walpole's has been so much under discussion, I will not enlarge farther upon it. If the grounds of the case do not satisfy, the precedent will go for little. It is not one or two precedents, even in good times, without principles, far less precedents contrary to principles, that will make Law, notwithstanding what the Author of the *Case* asserts. But one determination in a very bad time, as the end of the Queen's reign, and the decline of her glory was; and most especially, an adjudication of a corrupted, disaffected majority of a House of Commons, devoted to a Jacobite Administration, and poisoned with notions of arbitrary power; an adjudication opposed to first principles, and destructive of our prime rights, which are to be read and learned by the most illiterate subject, in the great, though unwritten code of the constitution;—one such determination, I say, will not be sufficient to make a Law in *defeazance* of the firmest establishments, and to rob the subject of his most valuable privileges. Which naturally enough leads to the consideration of the

Third ground, upon which we proposed to try the first branch of the question—namely, “the constitution of the House of Commons and the nature and extent of the authority and power by which the House inflicts the punishment of expulsion:” by which we shall see (if it can thence be shown) either that the power and authority is not of that sort or strength, that such an effect as incapacity is within its reach: Or, on the other hand
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it may appear, that the power and authority as such, that expulsion not only may, but must carry that consequence with it, as necessarily, as a cause produces its effect; unless we admit an unnatural naming of the expulsive power, or alledge an actual restraint and limitation in the Act of expulsion on purpose to diminish its effect.

Now, not to enter into idle speculations or vain enquiries as to the origin or antient state of the Democratical branch of the legislature; it is fully sufficient for our present purpose to say, the House of Commons is founded in, and owes its being to the constitution: A term we all understand, and a thing which was not made all at once, but is the production of the progressive improvement of time; by which *res publica, si semel ceperit bene, progreditur tanquam circulus semper proficiens*. It is the life and soul of the state, the spring of government, the measure of subjection, the law of power and of liberty: And itself exists, like the hidden substance of matter which is no otherwise known than by its visible powers and properties.

Upon this foundation stands the House of Commons, which, at this day, may be defined to be—the assembly of the representatives of the people, chosen by those separate and distinct classes or orders of subjects, who, by the constitution, are independently of each other, invested with the right of election; for a limited or uncertain time to be a part of the great council of the nation, for the purpose of maintaining and defending the aggregate stock of national liberty, and to exercise that share of the total power of the whole body politick, or great corporation of the kingdom, which constitutionally belongs to the people whom they represent.

From this definition it will follow, 1st. That the House of Commons, not being *self-created*, but
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made by the constitution ; and being only representatives chosen by the people, it cannot make its own power, because it did not make itself : Nor can it have power to destroy that power from which it is derived, and by the existence of which alone, it can subsist in its natural and constitutional state.

2dly. That its power being *derivative*, it must be just so much, and no more, than is, and can, by the constitution, be delegated and derived from the constituents.

3dly. That being chosen by distinct and separate classes and orders of subjects, who, *independently* of each other, have the right of election ; each Member, when *duly* elected, and *legally* possessed of his seat which he derives *solely* from his constituents, is, in *strictness*, and according to his true character and primary quality, *independent* as to his *representative-capacity*, of every other representative, and of the whole together : And cannot, from any original principle or quality of his *representative-character* be deprived of it by, or accountable for the exercise of the powers it invests him with, to the body of the representatives *.

4thly. The House of Commons being chosen only to be a *part* of the great council of the nation, and to exercise that share of the total *power* of the body politic, which constitutionally belongs to the *people*, whom they represent ; it must necessarily follow that they cannot, by themselves, do, what it only belongs to the *whole* council of the nation to do, and for which no less power is adequate or competent.

5thly. Being chosen to maintain and defend the
aggregate

* I have worded this as cautiously and precisely as I could ; being aware of the power of expulsion, of which below : And the legal doctrine of which, I conceive, will not in the least interfere with any thing here said, if rightly understood.

aggregate stock of national liberty, and, particularly, to maintain and defend the rights and privileges of those they represent; it cannot but follow, that they *ought not*, and, if their institution is the rule of their power, they *will not* hurt or invade either *.

6thly. And lastly, the end of their institution and election must, in the nature of the thing, imply every incident and collateral power necessary to that end: But so always (which is a distinction inseparable from the nature of collateral and incident powers in respect of the power in chief,) as such incident and collateral power be, in its nature, and in the exercise of it, subordinate to, and compatible with the institution, and with the due security of the sovereign and indispensable rights thereof, and of those rights on which it depends, or to which it bears relation, as well as with the great ends for which the institution itself subsists †.

These principles (and we think it would not be too much to call them axioms) will, we are persuaded, so speak for themselves, as to make the application of them to the present question easy. But the importance of the matter will apologize for not treating it too superficially.

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* For them to destroy the rights they are chosen to maintain and defend, is murder under trust, and may not improperly be called treason against their constituents and themselves, and high treason against the constitution.

† The House must have a power to adjourn as well as to sit; to form rules for the order of their proceedings; to compel the Members to attend and do their duty; and to preserve decency and purity in the assembly. In short, it must have the power of self government, and all authority necessary thereto: And we not only admit, but maintain as strongly as any one can, that the House has, and ought to have, the *sole* power of trying and determining who are, and who are not duly chosen according to the Law of the Land to be Members of the House.

If then the *representative-right* and capacity of a Member of the House of Commons, is, in its proper nature and primary quality, so very independent of the House, not only as to the origin, but the enjoyment and exercise of the right; a power of expulsion in the House, which is so contrary to a right of that nature, and so little *homogenial* with the House not having any share in the constitution of *itself*, must be very adventitious indeed; and must subsist for a very particular purpose: And therefore it must, of necessity, be as limited and restrained in its effects as it is possible for it to be; in order to preserve some consistency with the proper nature of the right on which it operates, and with the original want of power over it in the House.

This is a proposition of meridian clearness. If not self-evident, it is so much founded in every notion that can be entertained of the different kinds of rights; so consonant to plain reason, and indeed obvious to common sense, that the mind in its natural state of aptitude to discern and receive truth, cannot refuse to assent to it: For to contest it is nothing else than to deny the natural difference of things.

The nature of the right also manifestly shows, that the power of expulsion can be founded upon no principle whatever but that of the self-government incident to that of the House of Commons. And if the power of expulsion were yet in a state of formation, perhaps much might be said upon principles in the way of objection to it, because of the nature of the representative-right. Nor are there wanting, (as we hinted very early) those who are not yet perfectly reconciled to it. But time, which effects many things above the power of principle, has, we think established the expulsive power: And

And in not a few cases this even is a sufficient answer to doubts, *non omnium quæ a majoribus ratio reddi potest.*

We must not, however, forget the source of this right of expulsion. It grows but out of a collateral and very subordinate power, and at the best is rather a heterogeneous limb even of that. But admitting it to be now fully established, as we do, the other principles which exist in the absolute perfect and primordial nature of the *representative-right*, and are essential to the constitution of the House itself, and consequently are of the first and highest consideration;—these interpose with their checks and limitations, which as naturally spring out of them, as water flows from its fountain.

The instant, therefore, that expulsion trenches upon any of those other principles, it enters a foreign territory, and must walk suitably to the ground it treads upon. For so far as it goes there, it looses the likeness of the principle of which only it can be begotten.

The genuine offspring of a power, so subordinate, and so controuled and bounded by the very nature of the right affected by it, must bear the image of the father so strongly as to *demonstrate* the family it belongs to: And the origin for ever will be an infallible criterion, by which to judge of the true nature and just extent of whatever is ascribed to it. Any act or effect in exertion of, or proceeding from such a power, but manifestly exceeding all natural bounds, at once bastardizes itself, betrays its own pretensions, and proclaims its spurious birth. Simple expulsion *may*, and that is all can be said, it may be the child of such a power; it does but barely consist with it: But expulsion to *incapacitate* which not only crops the flower of the representative-right, but cuts up its very root, both in the Electors and Elected, so transcends that

power of generation to which its Being is attributed, that it must be of a higher extraction, and claim a different pedigree.

Just only to skim the principles we have laid down;—The constitution of Parliament is the sovereign Law of it's nature, and paramount to every other thing that can be called *the Law of Parliament*. It is a Law not made by, but, in some degree at least, beyond the legislative power. As the Laws of nature impressed by the great Author of the Universe upon the works of his own hand, regulate the powers and motions of material bodies; so the *frame* and *make* of Parliament, is the supreme Law of its being and essence, and must govern its power.

That supreme Law has excluded from the House of Commons the power of legislation. They are (to use their own words in the vindication of their exclusive jurisdiction, as to elections presented to the disputatious *James*)—They are “but part of “a body as to *make new Laws*.” Is, or is not then, incapacity the creature of a Law? The gentlemen admit it requires an Act of Parliament to make a perpetual incapacity. But they say 'tis within the power of the House of Commons to make one, to last as long as the same House of Commons does. The House of Commons then can make a *Law* but only of a short endurance. Plain sense cannot well comprehend such a *slicing* either of Law or of legislative power.

We ask the other side, Who drew this line? Or in what Law, Code, or Constitution, written or unwritten, is it to be seen or read? Does it lie in the *breast* of the House of Commons,—an *ens rationis* which exists in speculation? Or is it a sort of legislation which hovers in the clouds, and bolts out like lightning for the use of particular occasions? The questions puzzle. Their *justice* gets into the
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air; and after the manner of an apostolick vision, we hear unspeakable words, something, I know not what, of a *magic* power of the *subsisting* Parliament, of which this limited expulsive incapacity is the *efflatus*.

We know that all the powers of one House of Commons must end with the Parliament, because a dead Parliament can have no activity: And there is but one possible instance of its coming to life again. There are too, some of the powers of the House of Commons which live and die with the session. But there seems to be no logic in this consequence, that because the powers of the House of Commons must have an end, therefore, while they last, it may do any thing, or do what it was never made to do.

If our principle were, that the House of Commons did not make the Parliament, which is a perpetual succession of independent Houses of Commons, and therefore that it cannot make an incapacity for a *future* Parliament, it might be the shadow of an answer, though fallacious, to say—it may nevertheless, with the power it has, make one for its own Time. But our principle is that the House of Commons cannot make its own power, because it did not make itself, and no such power is given or delegated to it, as can create *any* incapacity, because incapacity requires a Law to produce it.

If the House of Commons were it's own electors; were it *αυτοχειροτονεϊτος*, created by its own suffrages, they might as easily make an incapacity as inflict an expulsion, and needed but to infuse the one into the other to make the effect follow by a *causal* necessity. But the thing denied is the existence of the power to make an incapacity; and therefore it is no dismembering of the expulsive power, nor does it require any limitation in
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the expulsive act, to exclude an effect which does not, and cannot naturally belong to it.

The right of election is in the people, and they hold it not only under the immediate protection of the House of Commons, who are bound to defend it; but they hold it absolutely independent of the House, and controuled by nothing but the Law of the Land. I do not say, they hold the *exercise* of the right independent of them; for that is subject to their judicature in cases of election, as the possession of the right also is. But I deny that the *right* of election is subject in any degree to them; and I shall prove it is not, before I have done. Nor shall I take for an answer to bring the right itself within the *vortex* of the jurisdiction of the House of Commons, what has been said of the right of being elected, *viz.* that the right of electing too, is a *parliamentary* right, because it is to be exercised *for*, as the other is to be *in* Parliament.

Passing this, however, for the present, I repeat it, the people hold the right of election absolutely independent of the House of Commons, and the representatives themselves hold their representative-right also independent of the House, with this single limitation of being liable to expulsion with its just and constitutional effects. Do the gentlemen then recollect what incapacity is?—That it is laid not upon the person expelled only, nor upon his own immediate constituents only; but upon all the Electors of England? And shall the House of Commons, in the person of one man, disfranchise all the people of England?—The House of Commons bound to maintain and defend all the privileges of the people—The House of Commons which cannot make a Law to deprive the meanest subject of the lowest right.—Yet *disfranchising* them it is; for the unlimited freedom of election controuled by nothing but the Law of the Land, is
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of the essence of the franchise : And if restrained but as to one subject who is legally capable, and whom the Law has not incapacitated ; (and it must be to as many as the House in their wisdom and direction thinks fit to expel) the franchise is so far diminished, it is so far cut off.

The Author of the *Case* may tell us, as he does with great gravity, that “ though the House cannot, and God forbid they ever should, say, “ whom the Electors shall choose ; yet they may “ declare who by Law are not to be chosen : And “ by expelling a Member, they declare without “ saying more, that he is incapable of being “ elected for that Parliament.”

But this is only *after the manner* of our Author : For there is all the difference in the world between declaring who *by Law* are not to be chosen, and declaring without saying more, that is silently making a person incapable by expulsion without any Law for it. Language long ago used in Parliament has taught me this plain and sound doctrine, that “ it being the great privilege with Englishmen, “ that they are not to be taxed but by their representatives ; it is a *disfranchising* them of the main “ part of their *birth-right* to do any thing that “ should shut them out from their *free* votes in “ electing.” This expulsion-incapacity however, does it.

But with what part of the constitution or power of the House of Commons does this quadrate ? It is totally discordant with the origin, the nature, and end of the institution—with the constitution of Parliament, which is emphatically the Law of Parliament.

Were such the omnipotence of the House of Commons (for on such an occasion we may call it so, though it is a bold figure, as the Author of the *Case* observes) why could it not disfranchise a
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venal borough that had justly incurred their highest indignation? Why order in a bill to cut off the corrupt corporation of Stockbridge? Might they not by a vote have incapacitated them for the *subsisting* Parliament at least: Or expelled them from the Parliament roll?—A power, by the way, which, though it may be a question *in apicibus juris*, how far it extends, cannot certainly be infinite, or the constitution might soon devolve. Was an exclusion of one prostitute borough more than an incapacity upon all the Electors of England, be it but as to one man, and for the subsisting Parliament.

It surely is not necessary, after what has been said, to compare the present case with other instances of excess of the constitutional powers in the House of Commons. Do they want to retrieve all the power to which they ever made pretensions? The *Journal-mongers* may find in their musty records among the four parliamentary judicatures, one that was exercised before the Peers and Commons together. They may send us to the folios of the *Placita Parliamenti*, to study the barbarous learning of cases adjudged by the Prelates, Earls, Barons, and community of England, and by the Lords and Commons.—They may themselves consult the sentences of fine, imprisonment, pillory, and much more, pronounced by the House of Commons, for crimes at common Law against Berresford and others, who were not Members of Parliament; and particularly the famous case which is the magazine of the learning now raked up about the House of Commons being a court of record: I mean the case of Lloyd, whom the Commons, *in the Commons House of Parliament*, did *adjudge and award* to suffer a strange punishment for slandering the King's daughter: A precedent not attempted, I believe, to be followed since Cromwell's House of Commons (fanaticks as they were themselves of the

the worst kind) inflicted a cruel doom of that sort upon a poor frantick fanatick. They may try to revive the dispute which that case of Lloyd's brought on with the House of Peers for invading their jurisdiction, and which ended with a sort of compromise advised by the solicitor general "that it would do no harm to agree that no use of that precedent should thereafter be made, for increasing the power of the House of Commons, or abridging that of the House of Lords."

These, and much more of that rubbish to be found in the Journals, are all *precedents*: And precedents, we are told, are the *Law of Parliament*, which is set up as a part of the Law of the Land, but only to devour it, as Pharaoh's lean kine did the fat.

The Constitution is, we hope, now in a state of maturity, and the waves of fluctuation calmed: And as a man naturally robust and prudently temperate, seldom needs medicines, we trust a constitution so well moulded in its form, and so happily preserved in its shape, as ours has been, does not require daily or much repair. Contests, like the present, helped to settle the constitution, and to fix the bounds of Parliamentary jurisdiction. The present dispute may tend to brighten the landmarks, and, we hope, it will have no worse effect.

The Author of the *Case* has been at great pains to give us a full history of the attempts of the House of Lords, to invade the exclusive judicature of the Commons in matters of elections. Gentlemen so conversant in the Journals, cannot have overlooked the instances in which the House of Commons, as the guardians of the rights of the people of England, also made their stand against the Lords, in support of the *Law of the Land*.

It is worth while to observe the spirit with which the Commons resisted the Lords, when they at-

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tempted, in 1667-8, to erect themselves into an *original* judicature to try causes in the case of Skinner, who, upon his petition to the Lords, got a decree for 5000*l.* damages against the East India Company. The Commons ordered Skinner into custody, for applying originally to the Lords in a *common plea*, which they, with great truth, said *was not agreeable to Law*; and they voted “ that
 “ whoever should be aiding or assisting, in putting
 “ in execution the order, or sentence of the House
 “ of Lords, in the case of Thomas Skinner, against
 “ the East India Company, should be deemed a
 “ BETRAYER OF THE RIGHTS AND LIBERTIES OF
 “ THE COMMONS OF ENGLAND, and an infringer
 “ of the privileges of the House.”

The dispute between the Houses produced a prorogation of the Parliament. But the people of England have reaped the benefit of the attention the House of Commons in that instance gave to their rights and liberties: for the like attempt has not since been made *.

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 * A late proceeding in the same place, nearly connected with this business, was thought by some to carry too much the aspect of exercising an original, and not a very competent criminal jurisdiction. It is not to be wondered at, if the least appearance of that sort carried an alarm with it: for the distinctions of jurisdiction and the forms of trial, especially in criminal matters, are essential to the liberty of the subject. To say the truth, the House of Lords have been remarkably tender of assuming or extending their jurisdiction: which makes the attempt in the case of Skinner the more surprising. The appellate jurisdiction of the Lords, upon writs of error from the courts of common Law, was very early established beyond dispute: But it was long before appeals from courts of equity made their way. Which is the reason of the many proceedings we see in the Journals of the House of Commons upon complaints against decrees of the court of Chancery, and acts of Parliament to reverse and confirm them, particularly while lord Bacon held the Great Seal. About that period, the growing jurisdiction of the court of Chancery was much inveighed against as a grievance. At last, upon a personal complaint

The Lords not long after returned the compliment, and stood forth as the protectors of the people's rights against the Commons, when they pretended, in a strange manner, to extend the privilege of their House to stop an appeal in a cause of a Member of Parliament. The Lords, as faithful to the privileges of the people, as steady to maintain *their* own jurisdiction, nobly opposed that usurpation of privilege by the House of Commons, because, as they justly said, such a privilege would induce a total failure of justice in the land: And the dispute between the two Houses went so far, that the King was obliged to prorogue the Parliament on account of it. But the fruit of the contest has been, that the Commons have not since pretended to a privilege so unconstitutional and destructive.

The comfort ministered by such instances, is, that when incroachments of any kind are made upon the rights of the people, in a free constitution so well ballanced as this is, the people find protectors for their rights, whoever invade them, and the evils produce their own remedy. We do not therefore think we have gone out of our way, to bring up to view, on this occasion, successful vindications that have been made in former times, not only of Parliamentary jurisdiction, which the Author of the *Case* goes so much aside to assert for the House of Commons; but of the *common Law of the*
N 2 *Land,*

complaint to the House of Lords against Lord Bacon, on account of a decree of his, the foundation of appeals to Parliament was laid, which is now the regular course of justice, and of the jurisdiction of the Lords, as the undoubted Law of Parliament. But if the Lords ever were to assume an *original* jurisdiction, either in civil or in criminal causes, except upon impeachments of the Commons, who are the GRAND INQUEST of the nation; there is an end of liberty, and MAGNA CHARTA itself is laid in its grave.

Land, and the COMMON RIGHT of the subject; which is the very *heart* of the Question now actually in dispute. It is to be hoped, every right of the people, especially the great right of free elections, will always be secure under the protection the constitution has provided for it, whether that must be sought for in one branch or another of the well poised powers of the great machine of government.

Let each part of the legislature possess its own share of authority. No good subject wishes at this time of day to disturb settled possession. We do not even for *retaliation*, desire to recall the times in which the powers of the Commons were more cramped than at present;—when they went to the Lords for release of their own Members, even of their Speaker, when imprisoned in breach of privilege—and went without success; nay, were obliged to have special acts of Parliament to discharge out of custody the servant of a Member of Parliament: We want not to revive such restraints upon the power of the House of Commons, as we read of in Lord Coke, who tells us, “ it was the
“ Law and custom of Parliament, that when any
“ new device was moved in the King’s behalf in
“ Parliament for his aid, or the like, the Com-
“ mons might answer that they tendered the King’s
“ estate, and were ready to aid the same, only in
“ this new device they *dare* not agree without
“ conference with their countries.” Whereby it appeareth (as his lordship adds) “ that such conference is warrantable *by the Law and Custom* of
“ Parliament.”

This is, perhaps, not the only instance of the Law of Parliament, which the House of Commons at this day would choose to call *obsolete*. But let not the advocates for the power of the House of Commons injudiciously use this same weapon of
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the Law of Parliament, which they may see has two edges, though probably it is most blunted on that side they would be least fond to whet.

On the other hand, they must suffer the friends of liberty to hold up the constitution of Parliament, which is its highest Law, and the true principles on which all the power of Parliament is founded, as a defence for the rights and privileges of the people; which has always been used when they were attacked. We shall take the liberty to think, and we hope we are yet *free* so to do, till better arguments or authorities, than any we have yet seen, are produced, that there is no warrant for incapacity, as the necessary effect of *expulsion*, either in the constitution of the House of Commons, or in any power which to us is known to belong to it: To prove which, we devoted this third head of the grounds or principles on which the first branch of the question ought to be tried.

There remains only to conclude the discussion of this first branch, the forth ground or principle by which we proposed to examine it, namely, “the end and design, or the use and purpose of “expulsion, from which it will appear, if it can “be made appear, that expulsion does not answer “its manifest end, unless it includes incapacity: “And consequently the necessity of its implying “such an effect, will be demonstrated; or it will “be shown on the other hand, that it would be “as useless, as unfit and improper that it should “go so far.”

There can be but *these* uses in expulsion—to punish the Member as an example for preserving order and preventing offences—to preserve the purity of the House—and to secure to the constituents a proper representation.

To begin to the last, which is, out of sight, the greatest

greatest of the three; *expulsion* without incapacity secures this end, because it gives the constituents a new choice: And had it not been for this, I doubt much if expulsion had ever been found among the powers of the House of Commons. The best solution of a thing so contrary to the origin and nature of a seat in that House, may perhaps be this, that the constituents could not recall their own commission: And therefore it is *in the House* to expel, that there may be room for a new choice, when they are of opinion a person formerly chosen is unfit to sit.

But till I see, what can never happen, the House of Commons made the *Judges* of the fitness of the people's representatives, I cannot see why expulsion, which is the act of the House, should infer incapacity, only to restrain the free choice of the constituents. The constitution, so far as I have been able to discover, has reserved to the Electors themselves, under the limitations of Law, to judge who are fit to represent them: And if they should differ in opinion with the House, they have the best right to judge, because they have the greatest interest in the choice. For as the best writers on government have observed, nothing more requires freedom and indifference, than this of electing Members to serve for us in Parliament, who have put into their hands the power of our estates, of our liberties, of our lives; and therefore it is but reason, that those who are so much concerned in the determination of the persons to be elected, may have a free and indifferent choice of them. The opinion of the House expressed by their expulsion, will naturally have all the weight it deserves, as an advice or direction to the Electors, and the constitution or Law only can give them a negative. But such a negative is so contrary to the nature of *representation*, that it is nothing more than

than reasonable to require a very clear and positive law for it.

As to preserving the purity of the House, it does not seem to be too much to suppose that the Laws of the Land are sufficient for that purpose. One whom the Law of the Land has deemed unfit to be in Parliament, cannot be chosen, because he is under a *legal* incapacity: And I know no other legal way of determining who is fit but this, that every one must be deemed fit, in a *legal sense*, whom the Law has not declared to be unfit.

But supposing a particular instance, which cannot be supposed often to occur, that a person was in a moral sense very unfit, though not under an absolute legal exception; such unfitness must arise from something, that the Law can take notice of, or it is nothing to any legal purpose; and if it does arise from such a thing, and Electors should notwithstanding choose such a person (which is a supposition so contrary to the natural course of things, as hardly to be an object of legal attention) still there does not appear to be a defect of remedy, even in *the course of Parliament*. The House of Commons has the power of impeachment; and upon impeachment, the House of Lords have a legal jurisdiction over all the subjects in the kingdom, and can, by a sentence, in the course of a legal trial, according to the Law of the Land, declare a person incapable of holding any place of publick trust, which will effectually take him out of the way of misguided Electors.

This has been often practised by the House of Commons, and it seems particularly to have been the old fashioned course of Parliament, for the Commons to carry members of their own before the Lords, for punishments beyond the legal power of the Commons to inflict. It did so with Sir

Giles

Giles Monpeffon and Sir John Bennett; and after Sir Giles was expelled, he was by judgment of the Lords confiscated, degraded; rendered infamous; and incapable of public trust, &c.

To say but a word to the other object of expulsion, as a punishment, for example, to preserve order and prevent offences; no censure of the House of Commons to persons of that rank that intitles them to sit there, can be esteemed a light thing: And censures much lower than expulsion have, in general, been found sufficient to preserve internal order and decency. Expulsion must be felt as a very high censure. It punishes the present offence most sensibly; and if a Member expelled is re-elected, and does not again offend, the censure has had its effect. If he transgresses afresh, he is liable to be again expelled, and if the expulsion is just, it will, in a natural course of things, have the effect of exclusion. For we cannot argue upon a supposition that mankind are all madmen or fools.

If the cause of the expulsion does not convince Electors that the person expelled is unfit to represent them, it is no great sign in favour of the expulsion: And I think it is by much the *better* opinion, that the judgment of the constituents ought to prevail over that of the House, supposing them both to be only equally liable to err. Let me add this consideration more—That if the power of expulsion is necessary to secure to the constituents and to the kingdom a proper representation; so the free right of election may, in its turn, be useful to protect a fit representative against the groundless fury or political frenzy of a perverted majority of a House of Commons, which has had its days of havock before now, to contrast with any period of the peoples folly. We have heard of the Parliament 1640, through the middle of whose expulsions,

sions, the writer of the *Considerations* himself, has been obliged to cut a line.

The Author of the *Case* has indeed spent a paragraph to inform us, that “ to admit the right of expelling, and argue that the Member expelled may be re-elected, is to contend for the grossest absurdity; that it would expose the judicature of the House of Commons to flagrant insult and contempt; and render their determinations nugatory, and of less weight than the lowest court now existing.”

The absurdity I commit to the argument that has been submitted. As to the rest, I am strongly inclined to believe, if ever a sentence of expulsion, even though admitted to imply no incapacity, expose the judicature of the House of Commons to contempt; the fault will be as often in the exercise of the judicature, as in the inefficacy of the sentence: And whenever it is so, there is no insult. The gentlemen themselves would persuade us, that no expelled Member was ever re-elected before Sir Robert Walpole; and they admit it was not then known to be Law that expulsion inferred incapacity, for which reason the House of Commons did not take the advantage of the Electors ignorance to *confer* the seat upon Mr. Taylor with his *minority* of votes. The fact stated by themselves therefore proves, that sentences of expulsion have met with due reverence from the people, even when they did not know, that they were tied up by an incapacity.

The House of Commons may trust a wise and legal exercise of their judicature on the same ground as long as men are rational creatures. The people in all countries are naturally inclined to pay a respect to senates and national assemblies; but more especially where governments have any mixture of the popular. *Qui tribunis plebis nocuisset ejus caput Jovi sacrum esset.* And this respect will
O certainly

certainly never be lost, but where senates and assemblies are seen to prostitute themselves to the views and designs of base and ambitious men in power.

We might appeal to all who have ever been in Parliament, especially in *these* days of virtue, if expulsion, which must at least *cost* a new election, is a negatory punishment.

The constitution can take no notice of boroughs at the command of particular persons, which the writer of the *Considerations* mentions to prove that incapacity, not expulsion, was the punishment chiefly intended for Mr. Sackville, who would not be eight and forty hours out of Parliament while the Borough of East Grinstead could choose him. What the constitution takes no notice of, a legal argument has nothing to do with.

Another argument used by the Author of the *Case* deserves to be taken notice of, not for its strength on his side, but because it excellently illustrates and confirms our doctrine; and may make it strike more forcibly by putting his reasoning in the scale against our principles. "The member (he says) is expelled by the people of Great Britain assembled by their representatives. And shall a part of the people, shall the Electors of a particular county, say,—We will not be bound by the judgment of the majority—shall they be at liberty to restore him who had no power to expel him?—*Certainly not*"—Answers our Author to himself with great facility; and he is a fool indeed that puts a question to himself, that he cannot easily answer.

But I happen to be so unfortunate, as to apprehend that our Author's reason, is, from the nature of the thing, an unanswerable one, why the expulsion should *not* bind the Electors, not to re-elect, viz. exactly and precisely, because the
Member

Member is expelled by the representatives of the rest of the people, that is, by those who did not choose him, and had no right to choose him, and therefore should not have a power to deprive the Electors of their right to choose him, or him of his right to sit when he is chosen by them: Both which rights we have proved to be in their nature independent of the House, and of all the other representatives in it, and of the whole people, but that particular body of Electors who choose, and by choosing, give the right of sitting to the person chosen by them.

If *they* should not be at liberty to restore him who had no power to expel him, why should *they* be at all at liberty to expel him, who had no power to bring him there at first. For our Author's argument is just as good for the one negative as the other; and there is an authority for it: *Nibil tam conveniens naturali equitali unumquodque dissolvi, eo ligamine quo ligatum est.* But if a better foundation could not be laid for the power of expulsion than this argument of our Author's leaves it to stand upon, we suspect it never yet had been found out. We have endeavoured to show, how the power of expelling, though in its nature repugnant to the origin of the seat, does lie in a *peculiarity* of the constitution, as founded in the incident and inferior power of self-government, subordinate to, but consistent with the great end of an independent representative-right, and necessary to preserve a pure representation.

It is more natural that the constituents who have the power to make, and also the power to unmake the Member at every new election, should be at liberty to exert that power *freely*, than that the House, who cannot make, but only can expel him, should have power to restrain the Electors, as a sort of accession to the power of expulsi-

on, which is at best a very heterogeneous, and therefore a very limited power.

The other argument of *supposition* urged by our Author, will equally appear to want the sterling quality, when brought to the touch-stone; as bad arguments, always do, when assayed by principles. He puts the case "that the people instead of being assembled by their representatives, had been personally convened;" and he asks this other question, "Will any one say, that a person having a right of being present at that assembly, may not forfeit that right by indecorum, by treachery, by immorality, &c. And are not the majority of the assembly the sole judges of his fitness to continue a Member? If they judge him incapable, may they not expel him? And can he ever acquire a seat in that assembly again, against the sense of the majority?"

Now to bring this to a very short point upon a *real* case, the nearest to the one supposed that can, I believe, be figured: I ask in my turn, if the Electors of Middlesex are assembled to choose a Member of Parliament, where every freeholder of forty shillings has a right by virtue of his freehold, and under the Law of the Land, to be present and to vote; and has that right independent of the whole body of freeholders; in that case, I say, I ask, if the majority of the freeholders can, for any reason whatever, expel one of the body, or exclude him from his vote?—To use our Author's short way of answering; I say—Certainly not. If a freeholder is riotous and breaks the peace, the sheriff may do what is necessary to preserve it. The sheriff too is judge, in the first instance, if one who claims a right to be present and to vote as a freeholder, has the legal qualification.—But nobody will say, that the freeholders can expel a freeholder. The reason is apparent. He holds his

his right in himself independent of them: And nothing but the Law can deprive him of his vote. An instance could be mentioned of a person of rank adjudged to be infamous by the highest judicature in the kingdom; who, nevertheless, could not be excluded from a most respectable body of freeholders; because the judgment did not affect his freehold, or his right to vote. So, it is by special statute only, that perjury, with regard to qualifications, incapacitates one to vote in an election of a Member of Parliament.

Finally; it is of no importance in this argument, that, as our Author observes, every Member when chosen serves for the whole nation. He must serve for the whole nation, because he is elected to sit in the council of the nation; and both the council and the nation are *indivisible*: but if this circumstance proves any thing, it is only, that because the whole nation, as well as the particular Electors, has a property and interest in the seat, and consequently in the capacity of every Member, the power of expulsion is not only to be the more tenderly handled, but the effects of it not to be extended beyond the natural and due bounds of the power, so as to hurt the interest of the nation, or rob it of its right.

Thus we have at a length, which it is to be feared, may rather have appeared tedious, discussed the first branch of this very important question, viz. “ whether incapacity be implied in, and the “ necessary effect of expulsion.” If what has been said is of any force at all, it unavoidably anticipates, in some measure, the second branch, to which we now proceed—Namely, “ the authority “ and effect of a resolution of the House of Commons declaring an incapacity, or ineligibility.”

It will be understood that, we here suppose with the writers on the other side, a *resolution in a particular*

ticular case upon the trial of a return of a Member to serve in Parliament, adjudging that the person returned is incapable of being elected.

Here, it is extremely difficult to bring any one of the writers, whose performances we are considering to a consistency with himself, and much more to make them both agree. The position of the Author of the *Case*, expressly and repeatedly laid down as has been seen, is, that "admitting" incapacity was not a necessary consequence of "the expulsion, yet the express declaration of incapacity by the resolution was binding." And, in other parallel terms, the writer of the *Considerations*, is yet more incomprehensible; he tells us page the 6th, it has been said, "the House of Commons cannot by their resolution make the Law; they cannot, without an Act of Parliament, incapacitate any man, or body of men, from having a right to be elected." And he instantly adds "I admit it, but this power, as so stated, was never contended for—the matter in dispute is, whether the House of Commons, in matters of election, can by their resolution without an Act of Parliament *declare* the Law; and whether if, by Law, any man, or body of men, are excluded from being eligible into Parliament, the House of Commons is not the sole and exclusive court of judicature, by which this Law is to be declared, and this question to be determined: And to this (says he) which I take to be the fair state of the question, I do not believe any man will give his negative."

But, for goodness sake, why does the gentleman beat the air? Or, in his own words, Why does he combat a phantom? Is there no question between us; or what would he have the question to be? He admits what he says is stated on the other side; I admit what he states as above. Are

we then agreed? If we are, to what purpose has he wrote such a treatise as he has given us?

No: verily we are nothing less than agreed. For whatever be the form of this gentleman's words, and however strongly and clearly he admits, as above quoted, "that the House of Commons cannot *incapacitate* any man, because," (as he elsewhere plainly says, page the 18th) "the resolution of the House of Commons cannot *make* the Law." Yet, in reality, he is contending all the while for nothing else: And the fallacy, which is rather insidious, though too gross to deceive, lies in this, that as he advances, "the House of Commons can *declare* the Law; and they are the *sole* and *exclusive* court of judicature, by which this Law of incapacity is to be declared, and this question of eligibility to be determined"—Ergo, what? This and nothing else,—that whatever the House of Commons does declare to be be Law,—is Law,—because there is no appeal from their jurisdiction.

With this lurking fallacy, he proceeds again to say, (page the 7th, lin. ult.) the "House of Commons declare the Law of Parliament to be, &c. —Is this making a Law by their own resolution? Do they say that Mr. Wilkes, having been expelled, *shall not hereafter be re-elected into this Parliament?*" In the name of wonder, if they have not said *this*, What is it they have said? "No (says the writer of the *Considerations*) the resolution is, we having a right to declare the Law, and having consulted precedents, (*and so forth,*) do adjudge, that a man in Mr. Wilkes's situation is, by the Law of Parliament, incapacitated from being elected to be a Member of this House of Commons."—Yet, but the very last words he had wrote, he had, by putting the

the question as the strongest kind of negation, denied that the House has said that *Mr. Wilkes shall not hereafter be re-elected into this Parliament.*

This is blowing hot and cold at a strange rate. I must give it up as utterly unintelligible. But the point the writer at length comes to, is this, to show, page the 8th, "that the House of Commons have at all times, without objection or controul, exercised this jurisdiction of declaring by their own resolution *singly*, and without an Act of Parliament, what the Law is, as to the eligibility or disqualification of Members to serve in Parliament."

This, if I understand it, is, as I said before, and it cannot be any thing else, that the writer is to show, *that whatever the House of Commons declared by their own resolution SINGLY to be the Law, as to eligibility or disqualification, is, and SHALL be the Law, and nothing else.* And full, as a Trojan Horse, of enemies under cover, he discharges his masked battery of *classes* of persons, the House has at different times *resolved* not to be eligible.

If the gentleman had meant no more than that the House of Commons, as the judicature for matters of election, may *declare Law that exists*, that is, may apply the Law in being to the case; I have said I admit it, and he says nobody will give it a negative, we should therefore have had no dispute. But truly it is impossible to chace these gentlemen in all their turnings and windings. Their doctrine would not suffer them to keep a straight road. Sometimes they walk together a while, and then they jostle one another. But they are both so careful to conceal, as far as it is in their power, their real drift; and for that purpose, they confound and convert terms so amazingly, that we are obliged to ferret out their design, before we can state a fair question to argue upon.

To return then to the question, I am in the judgment of any intelligent person, who has read the *Case* and the *Considerations*, if I have misrepresented the real doctrine of either of the gentlemen. And the only question I can state upon it is this, Whether, or no, (in the words of the Author of the *Case*,) “ admitting incapacity not to be the “ *necessary consequence* of expulsion, or that expulsion does not of itself *create* incapacity, the “ House have a right to declare who are, and are “ not eligible.” Or, (as it is expressed in the *Considerations*,) “ Whether the House have a right “ of declaring by their own resolution *singly*, what “ the Law is, as to eligibility or disqualification.” Which, I have shewn, does, and, in the mouths of these gentlemen, only can mean, That the House *can by a resolution upon a return incapacitate any person returned, by declaring him ineligible*, although there be no Law in being, other than or antecedent to the resolution by which he is *declared or adjudged to be incapable*, i. e. is deprived of his COMMON RIGHT of being elected.

To meet this question on fair ground, and to meet both the Author of the *Case*, and Writer of the *Considerations* as near as possible.—The first test I proposed for trying the point was,

“ The character or capacity in which the House “ of Commons act, when they do, and only can, “ make resolutions or adjudications with regard to “ incapacity : And the nature of the power competent to them in that character.”

The gentlemen have answered this themselves. The House of Commons is acting as a “ *Court*, “ having a right to examine and determine returns and elections, and all questions incident “ thereto.” It is the power of *judicature* they are exercising, and that *only*. In such matters, “ they are (as the House asserted to K. James I.)

“ a court of themselves, of sufficient power to
 “ DISCERN and DETERMINE.” I enter into no dis-
 quissions or distinctions as to a proper or improp-
 er sense of the word, *Court*, applied to the House
 of Commons ; or whether they are a court of *re-*
cord, which has been disputed between the Lords
 and them : I shall only say, it is not very compre-
 hensible, that there should be a court of record,
 from which no judgment, order, or process can is-
 sue, but under the hand of the Speaker, and not
 from the record, or through a proper officer who
 can act from the record : They are a part of the
 high court of Parliament, and they have judicature
 in certain cases, and a right judically to determine
 upon certain things.

Now it is a proposition that demonstrates itself,
 that a *court* to *discern* and *determine*, cannot make
 Law :—they are only to apply the Law that exists
 to the case before them. The very idea of judi-
 cature excludes the notion of making Law : And
 those who have studied the principles of govern-
 ment know it is a solecism in policy, to confound,
 or blend together legislative and judicial powers ;
 because it can hardly fail to produce a perversion
 of justice. If the House of Lords, who are a court
 of record in the most proper sense, were in the ex-
 ercise of their high judicature, instead of deter-
 mining according to Law, to make a resolution
 of their own to be a Law for one case, or for all
 cases of any one line or order, their resolution
 would be void : For as a court of Law, they are
 not to make but to expound and apply the Law.

Secondly, As the next principle or ground, on
 which to try this branch of the question, let us en-
 quire what is the “ subject matter, upon which
 “ the power competent to the House of Commons
 “ in their capacity and character, as a court to de-
 “ termine upon elections and returns, operates on
 “ is

“ is exercised : And what are the bounds within
 “ which it is, in this respect, legally circumscri-
 “ bed.” And

In general, I answer, this power of the House being *judicial*, it must, as in all other judicatures, necessarily and in the nature of the thing, operate upon every right or claim, every privilege or franchise, every character or capacity, that can, in the competent exercise of the judicature, be brought into question ; whether in respect of the title to the enjoyment and exercise, or the effect and consequence of that matter or thing, so brought into question. To express myself in terms as general as I can find, I say this judicial power must reach and extend to every thing in Law, or in fact, necessary to the trial and determination of the cause before the House. But then I add, that the power being judicial only, it must also in the nature of the thing, and from the same necessity, be confined to such proceedings as are strictly judicial : For it is *but* a power of *judicature*, the House, in this instance, is exercising.

I could agree with the Author of the *Case*, that
 “ the rights and qualifications of the Electors and
 “ Elected, together with returns of writs, and all
 “ matters incidental to elections”—are the subject
 matter upon which this jurisdiction of the House of Commons is to be exercised :—Or, that the
 “ House has, (as he says) the sole and exclusive
 “ power of examining and determining *those* ;”
 but I know there is a secret equivocation in the words. Any one may see, that the sense in which the Author means that the House has a right to *determine the rights, and qualifications, and disqualifications of the Electors and Elected*, is this, that they have a right by their own authority, or by their resolution singly, to say, what is, or is not a right, a qualification, or disqualification. Indeed the

writer of the *Considerations* seems inclinable to stretch the power of the House of Commons so far, that they may, under this idea of determining the rights, and qualifications, and disqualifications of Electors, *give*, as well as take away the right of election. At least I cannot see what else he means, when, for illustrating and confirming his doctrine on this head, he asks this question, "Has the right claimed and exercised by the House of Commons ever been doubted, to determine whether boroughs have by their ancient constitution a right to send Members to Parliament? A power (says he) much more extensive than that contended for in the present question."

To this I shall only answer, that if the House of Commons were to order a writ for Manchester or Birmingham, they would, in my apprehension, act as much against the constitution, and against Law, as if they were to resolve that the City of London has not a right to send *four* Members to Parliament: Because that would be, by an act of theirs, to confer the Parliamentary franchise, which the House of Commons never had, nor pretended to have the right to do; whatever the prerogative of the Crown may have been in this respect, which is now at an end by the *Pacta Conventa* of the Union. But in the instance referred to, there is nothing of *mere power*, but a fair exercise of the jurisdiction competent to the House of Commons, while the subject matter of it existed, which it does not now in fact since the Union took place. For that jurisdiction intitled the House to determine upon the right of a borough to Parliamentary representation, as much as it did to determine upon the claim of any particular set of voters within a borough, acknowledged to have the right of representation, to a share in the election.

Still

Still in the one case, as well as in the other, the House was to *judge* according to the right of the Law and the Case, whether the claiming borough had enjoyed the right of representation, and had, or had not lost it by discontinuance, or any other legal cause of amission. And such were the grounds of determination in all the cases of such claims that occur in the Journals. To give or confer the right, where it never had existed, the grant of the Crown was necessary, as in the case of Parliament, boroughs of new creation; or an Act of Parliament, as in the case of Wales and the counties palatine, which were joined to the Parliament of England. In those cases the House of Commons had no jurisdiction, because they were not cases of judicature but of legislation.

Therefore it is, that in all the cases to which the jurisdiction of the House of Commons is competent, they have only a right judicially to determine, whether the parties before them have, or have not, that which the Law has made to be the right or qualification; or whether they are, or are not disqualified by Law. And if there were any consistency in the confused speech of the writer of the *Considerations*, this is the only meaning of some of his own words: But he has no sooner said them, than he unsays them as fast as he can.

The gentleman dare not say in plain terms, that the House of Commons have a right under colour of examining the qualifications of the *Electors*, to determine that a freehold of forty shillings is not a qualification of an Elector in a county; and consequently, by a resolution to deprive the freeholder of his right: For which reason it was, we once before said, the freeholder enjoys his right of election, independently of the House of Commons. Neither is it pretended that the House of Commons, in examining and determining the qualification or disqualification of the
Electors,

Electèd, can adjudge that 300*l.* a year is not a qualification for a burghess, and 600*l.* for a knight of a shire. On the other hand, we do not deny that the House has a right to examine and determine upon the fact, whether the person is, or is not legally possessèd of such a qualification; and whether the Elector has legally, freely, and uncorruptedly exercised his right by voting. We only contend, that the right itself is no otherways subject to the examination or determination of the House, than that they can declare, that by the Law such is the right; not that they can make a right, or declare any thing to be a right, or qualification, which is not so by Law: Or that they can make an adjudication to deprive either Elector or Electèd of the enjoyment or exercise of the right competent to them by Law.

But under the general words, *right* and *qualification*, these gentlemen include *capacity* and *incapacity*. Then they mean to say, that because the House has a right to examine and determine the capacity and incapacity of the Elector and Electèd, they may, by the authority of their own resolution, determine or adjudge an incapacity: that is, they may make whatever they please to be an incapacity by the mere authority of their resolution.

We allow the House has a right to examine what is *by Law* an incapacity, and to try the fact, if A or B lies under it: And upon the Law and the fact, to determine whether A or B, is capable or incapable. But we insist upon it, that it is the *Law*, and *not* the *resolution* or will of the House of Commons, which makes the incapacity; and therefore that the Law must be the rule of this determination as to *incapacity*, as it is of the determinations with regard to *qualifications*: And that the House can only say upon such a question stirrèd, that *by Law*, this or that is, or is not an incapacity, and that A or B, is, or is not under it. We
maintain

maintain that the Law, and the Law only, makes the incapacity, just as it does the qualification of forty shillings, of 300*l.* or 600*l.* And the process of examining and determining the incapacity is very short: For every man, every commoner, is *capable of common right* and by *Law*: And if he has the particular qualifications required by special statutes, and is not, by Law or by some act of the Law, incapacitated or deprived of his common right, or of the possession or use of it, he is not, and cannot, by any resolution of the House of Commons, be made, declared, or adjudged to be incapable of being elected. The Law, which is the birth right and inheritance of the subject, stands in favour of COMMON RIGHT; and he who alleges an incapacity against any man, must produce the Law which makes it, and prove the fact to apply it to the person objected to.

So the stile of the Parliament men, when debating about the incapacity of the Attorney General in the reign of James I. was this; “nothing against him, but he might be of the House—considerable as he is a subject—every freeman may be chosen—the precedents to disable him ought to be shown on the other side.”

This the course of judicature, and as a court of judicature, and that only, the House are acting in the examination and determination of an election or return, or of any of the matters incidental thereto. If therefore the House of Commons, by a resolution, adjudges or declares any man to be incapable of being elected when there is no Law rendering him so, no Law *statute* or *common*; they not only make a Law instead of judging upon and according to the Law, which is their province as a court of judicature, but they *repeal* the COMMON RIGHT of the subject, which is the first and highest Law of England.

This

The House of Commons cannot resolve merely that A is not capable, or that he is incapable for any arbitrary reason they please to assign. They are a *court* to DISCERN and DETERMINE, that is, in Lord Coke's parallel phrase, *discernere per legem quid sit justum*. They must resolve upon the Law, and must show the Law which creates the incapacity. Otherwise the resolution is not a legal determination, but an act of power; and participates more of a bill of pains and penalties than of a judicial decision.

The same rules of judicature regulate the determinations of the House as to every other matter incidental to the examining or determining a return or an election. The House can resolve that a return by a Lieutenant of a county is *no* return: But they cannot resolve that the Sherriff is not the returning officer, because *by Law* he is. They may punish a returning officer for not executing the writ; but they cannot resolve, that a person shall sit without a return, because the Law requires one. When a return has been casually lost in the carrying, the House, on proof of the fact, have made a substitution for the return, as the court of Chancery in some cases can repair an accident to a deed: but that is not dispensing with, but substantiating a return. It is pursuing, not making or repealing the Law.

In one word, the province and the power of the House of Commons, acting in their capacity of judicature, is, *jus dicere*, not *jus facere*: And there needs no more than plain common sense to understand that distinction.

This is no diminution of the power of the House of Commons: it is the *nature*, the *Law* of *judicature*. Examples illustrate every thing. The Court of King's Bench, which has no power but that of judicature, can determine, that an out-law

cannot maintain an action, because, by *Law*, he is out of the protection of the *Law*. But they cannot adjudge that a subject under no legal incapacity shall not have any legal remedy he is by *Law* entitled to sue for. They can determine whether A or B have a franchise in a particular corporation, but they cannot determine that a liege subject cannot, or shall not enjoy any right, which by *Law* he may have in any community in the kingdom.

To go back to Parliamentary judicature, the House of Lords, (with which the House of Commons cannot decline being compared in point of judicature;) the House of Lords, I say, have as exclusive a jurisdiction in matters of Peerage, as the House of Commons have in elections: But the House of Lords, in trying a claim of Peerage, cannot resolve that the eldest son of a Peer, ought not, or, without a legal reason, that he shall not succeed to his Father, because by *Law* he is the heir of the dignity. If the claimants personality is questioned, the rules of judicature require a proof; if his legitimacy is objected to, it must be tried as the law directs in the spiritual court. But the right of succession itself, is beyond the reach of any power in the House of Lords to hurt it. For it is not in the power of the House, by an arbitrary resolution, to exclude a Peer from his seat. They cannot resolve that a Peer shall not sit in Parliament, because by the constitution he has that right. They can only determine whether the claimant has the right of Peerage in him or not.

Hence in a case that has been quoted on the present occasion, and mentioned but not answered in the *Case*, the Court of King's Bench justly paid no regard to that strange order of the House of Lords, by which, without a trial, Lord Banbury was, on a surmise of illegitimacy, denied the pri-

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vilege of Peerage. That great man, Lord Chief Justice Holt, like a Judge presiding in a Court of Law, and with the true spirit of an Englishman, spurned at the idea of depriving any subject of his *birth right*, but *per legem terræ, aut judicium parium*. He understood all the rights of the subject to be secured by Law from all incapacities, or *disinheritions*, without or against Law: And therefore he would not try Lord Banbury for a capital crime as a Commoner, while he had the plea of Peerage, of the right to which the House of Lords only could take cognizance.

'Tis equally certain with regard to *incapacities*, that the House of Lords in their judicature as to Peerages, can only judge according to Law. The House cannot resolve that a subject, under no legal incapacity, is incapable of being created a Peer: Because it is the prerogative of the Crown to call up any Commoner to the House of Lords. On the other hand (for one instance of an incapacity) they cannot resolve that a foreigner is capable of being created a Peer, because it is against an Act of Parliament.

In the case of the Peers of Scotland who obtained Patents since the Union, the House indeed determined that such Patents could not give a seat in the British House of Lords: But it was because, according to the treaty of Union, the Scotch Peerage sat there already by representation. This, however, was only determining that the Law stood so: It was not making a Law of Peerage. I rather mentioned this case, because it has been thought a strong determination, and may seem, in its nature, to approach the nearest to such an adjudication of incapacity by the Commons as that in question: And we shall meet with a similar incapacity in the precedents of the House of Commons, flowing also from the Peerage of Scotland:

Of

Of which we shall take the proper notice when we come to it.

The decision above-mentioned only put a construction upon a positive Law, fundamental to the Union, by which the state of the Scotch Peerage was unalterably fixed. It only adjudged that by that Law, which was not to be changed by Parliament itself, no Peer of Scotland could be in the House of Lords both in person and by representation. And in that light, the case corresponds with determinations as to other attempts by the Crown, to give persons a seat in the House of Lords upon titles repugnant to the Law of Peerage: Such as creating Peers for life, and that rare and strange creation, as it was called of a *regular* Lord by Harry VIII. who gave a patent to the Abbot of Tavistock and his successors, to be one of the Lords spiritual of Parliament, though no Baron, and without a Barony: Which, it was held, the Crown could no more do, than it could make Deans and Arch Deacons, Lords of Parliament, as, without all question, it cannot. These decisions of the House of Lords, exactly agree with the determinations of the House of Commons, that certain classes and orders of persons, legally disqualified, are by Law ineligible.

Need we farther to enlarge? Is it not sufficient to say, that it is the great principle which constitutes the true distinction between freedom and slavery, that a free government, is a government by Law, where every man knows the Law by which he is to be judged, and the security of any right does not depend upon the will of Judges, or upon a Law to be arbitrarily made by them.

With the Writer of the *Considerations*, we are not indeed so much disputing about a doctrine, as labouring to *discover* a fallacy. In words, he professes that the House of Commons cannot make a

Law of incapacity, because they are exercising their judicature only: But his argument abjures the principle. *His* declaration of the Law, is nothing but a making of Law: And he builds upon the sandy foundation of the *sole exclusive* jurisdiction of the House. But of that I can make no other interpretation than this, that it resolves all right into power: And not being a disciple of Mr. Hobbes, I cannot subscribe to so *Leviathan* a principle. Power is no privilege for violence. It may give some sort of security in the execution, but it gives no manner of right to the committing of it.

Here, however, the Author of the *Case* perfectly agrees with his fellow labourer: For to the House of Commons, even as a *Court of Judicature*, he directly ascribes the effect of *legislative* power; at one stroke cutting the Gordian knot which he cannot untie. He says, *page 40, fin.* “ In the present case, the House of Commons acted as a
 “ *Court of Judicature*, in a cause regularly before
 “ them; their declaration therefore was the adjudication of the Court; and the adjudication of a
 “ Court, having competent jurisdiction, more especially of a Court without appeal, is the *Law of the Land.*” He does not rest here, for in *page 30*, he conveys yet a harsher doctrine if possible, in that piece of information mentioned formerly, that the House have “ *from particular circumstances and upon general principles of constitutional policy, adjudged persons incapable of being elected.*”

I have before spoke somewhat of my mind how far determinations of Courts make Law. That one determination, even of a supreme judicature, does not, I am certain: For in the Journals of the House of Lords, there can be shown decrees diametrically opposite to one another upon the same individual point, and in the construction of one statute.

statute. Such decrees, surely, were not equally the Law of the Land, though both were intended to be according to Law: For if the first of them had been the Law of the Land, the second could never have existed; unless upon this Author's tenet, that one determination of a Court of competent jurisdiction, is as good either to make or alter the Law as an Act of Parliament: Which is a principle, I am confident, the House of Lords never did adopt, and never will avow in their judicature, though it is as supreme as any can be.

Our Author's positions emancipate not the House of Commons only, but all supreme judicatures from the bonds of all Law whatever. It makes the will of Judges, the Law of Courts; and substitutes *policy*, instead of Law, to rule their decisions. But in what country was this doctrine taught? Not in this *free Land*. If policy is the Law or the Quality of the judicature of the House of Commons, which, perhaps, our Author learned from their old Journals; (we flatter ourselves not from those of the present time;)—We hope it is *their* peculiar prerogative. For if this *Pandora's* box of mischiefs is opened upon the other Courts of the Kingdom, the only comfort left will be, that hope stays behind when the evils fly out.

We have heard of a short question, which a venerable person, now no more, long the first Commoner of the Kingdom, used to speak of in *joke*, as the policy of that judicature. But it is probably the first time it has ever been heard of in Law: And it is to be wished that nobody may ever know the *lawless* legal meaning of it. Whoever it is that gives us such Law, woe be to him, and woe be to the policy of judicature: For woe will be to that Country where such political Judges live, as are guided by policy.

If, as our Author says, the adjudication of a Court of competent jurisdiction, subject to no appeal, can make the Law of the Land; I do not know why even *ship money* and the *dispensing power* might not yet find an asylum amongst us. It certainly might without any difficulty if Charles the 1st's and James the 1st's Judges could be raised from the dead; and, for sanctifying their illegal judgments, by the authority of a supreme judicature, which is all that is necessary; the *recipe* of Queen Anne's Tory ministry, (under whose blessed government Sir Robert Walpole was incapacitated,) were only applied to make a House of Lords composed of such men as princes of that stamp could never in any age be at a loss to find for their purpose.

To say that the House of Commons, in the exercise of their jurisdiction as to election, may, merely because it is sole and exclusive, upon policy or any other consideration whatever but known Law, declare or adjudge any person incapable of being elected, is to contend for a power which, by parity of reason, may destroy the whole Laws of the kingdom that can possibly come within the eddy of that jurisdiction. It is indeed to make a basilisk of that judicature of the House of Commons, to kill the Law, whenever it looks upon it. But such a power as the Law cannot live *with*, cannot itself live *by* the Law.

Those men who can find in their heart so to leave the Laws of the Land, and the rights and privileges of the subject, at the mercy of any House of Commons, the best that ever did, or ever can exist, should at least be kind enough to their country, to procure for the House a perpetual supply of the same infallible assistance, that the Church of Rome, which attributes it to the Pope to have all the Laws of the Church in his breast, has, for their own safety, provided his Holiness
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with, by giving him the Holy Ghost for his council.

Such Doctrine as these gentlemen may prove very convenient, as, if it is establish'd, there will be a speedy end of all controversy about *incapacities* and such sort of things: And, indeed, there can be no such thing as any right to remain, however fundamental it may heretofore have been thought, which an incapacity can breath upon. For if none but the House of Commons can judge what is an incapacity, and they may judge as they please, it is no matter how much they judge against right: They have the authority, and their power is good, however ill their act be.

It may not be soon that good or wise men, even accustomed to a sense of the value of their rights, will be brought outwardly to resist such a power: But it will be as late before any, except very bad or very foolish men, will inwardly approve many of the acts which are likely to proceed from it. To say the truth, it goes very near to reducing all fundamentals to the ludicrous definition of them long ago given by a writer of great wit, "that whatever a man hath a desire to do, if he hath uncontested and irresistible power to effect it, he will certainly do it: And if he thinketh he hath the power, tho' he hath it not, he will certainly go above it."

But we hope better things of our inestimable constitution, and things that accompany the preservation of our most valuable rights. We trust it is, and that it is not yet too late to maintain it to be sound constitutional doctrine,—that the House of Commons in it's jurisdiction, and judicature as to elections, is bound, and ever must be ruled, by LAW. Which leads to enquire, as another ground, by which to try this branch of the question.

Thirdly,

Thirdly, “ What is the law that governs, and
 “ ought to govern the House of Commons, in
 “ the exercise of the power, belonging to that ca-
 “ pacity, of which we have been speaking; that
 “ is, in their judicature when determining upon
 “ elections and returns, and consequently when
 “ judging of incapacities : Which involves the
 “ consideration of the Law of Parliament; what
 “ it is, and how far that alone, or any other spe-
 “ cies of the law, is the rule of their proceeding
 “ in such cases.”

To prove that the House of Commons must, in the exercise of this judicature be bound by some Law, were vain : For it is, as we have seen, implied in the very nature of judicature. And if there were no external or antecedent law which judges are only to apply, the office of a judge would cease, and all judges become legislators.

When it is asked, what law governs this judicature of the House of Commons, it might, in all reason be sufficient for answer, to repeat what has already been said,—that whenever a particular case came into judgment, the Law which is proper to it, must rule the determination of that case; it being their office as judges to decide according to Law. And it has not only been observed, but is in itself very easy to be conceived, how great a concern both the common and statute Law of the land must have, in determining upon the variety of rights and qualifications which come into question in cases of elections and returns, and stand partly upon *common Right* and *common Law*, and partly spring out of, or are founded in Acts of Parliaments.

To enter therefore into a farther detail of argument upon that head, would be both superfluous and nauseous. I shall only mention, of the many *Parliamentary* authorities that might be cited in
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confirmation of what has been said, as to the sense Parliament has had of the binding force of the common Law upon the House of Commons, what Sir Edward Coke is mentioned in the journals to have said, in reporting a conference with the chancellor about a petition to James I. in the 18th of his reign, That he had answered the chancellor, that the House had resolved, not to alter the articles which were grounded upon the *Law of the Realm*—That they had not *potestatem addendi* or *minuendi*. And when it was proposed, in the case of Sir John Bennett, after his expulsion, not only to secure his person, but also to secure his estate that he might not dispose of it, Sir Edward Montague answered in these words, as entered in the journals;—"Not to meddle with his estate—no precedent: *not this warrantable by the common Law.*"

The answer, short as it was, had it's effect; it made an end of the proposition. Such is the power of the Law. And so true was that ancient saying, *plebs eo libere agitabat quia nullius potentia super leges erat*. In that country only can the people be free, where the Law is above every other power.

So far however am I from setting up the authority of the common Law, in such a manner as if I wish'd to shun battle as to the *Law of Parliament*, that *sonorous* term which has been ecchoed and re-echoed with such force upon this occasion, that to it, principally, here I dedicated this particular head, on purpose to examine the weight of this great authority, this decisive argument for the power and right arrogated to the House of Commons.

The gentlemen on the other side have, indeed, made a sort of *spell* of the Law of Parliament, an enchanted wand, which causes the most sacred and inviolable Rights of the subject to jump out

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of their socket, as joints that suffer a dislocation. We have not so learned the constitution. To us the Law of Parliament is a very high authority, a great and respectable branch of the Law of the Land. But as the Parliament *subsists* by it's own proper Laws and Customs; so we apprehend these, as all the other Laws of the Kingdom, exist for the preservation of the rights and liberties of the people, which the Parliament itself was instituted to support and defend. And whatever be the authority or use of the Law of Parliament, we conceive, it will be found that the *actual exercise* of the judicature of the House of Commons, or the determination of particular causes competent to their jurisdiction, respecting elections, are the thing it has but least to do with.

That we may not (to use a vulgar phrase) seem to speak without book, we will venture it as the doctrine to be collected from the writings of those learned authors, who have professedly treated of the *lex & consuetudo Parliamenti* before or since Lord Coke, down to Dr. Blakinston's able and useful Commentary upon the Laws of England; that thereby, (at least in the highest and most proper, if not the only just sense,) nothing else is meant or understood, than those great principles which grow out of the *constitution*, the *make* and *frame* of Parliament; those establish'd usages and customs of Parliament, which settle the mode of it's subsistence, and the form of its proceedings: I will add too, that ascertain and mark out the extent and limits of its power. For omnipotent as Parliament is, (by a figure of speech, not wholly unexceptionable even in respect to itself,) sometimes said to be, it ought never to be forgotten, that the CONSTITUTION is above it, and bridle it: And if that curb ever loses its power, the constitution itself is no longer in being.

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The Law of Parliament (but a little to diversify the idea expressed under a former head,) is that which moulds its form, bounds its jurisdiction, and regulates and restrains its agency; either in the whole branches jointly, or in any of the three estates separately. It is not however so easy, by any general characteristicks, rules, definitions or descriptions, to convey a distinct idea of what is understood by the Law of Parliament. A few indisputable examples of it will have a better effect to set the matter in a clear light, than much abstract reasoning.

It is the Law of Parliament, that though Parliaments cannot be abrogated, but must be frequent, yet they cannot meet without being called by the Sovereign; nor be opened but by the King in person, or his commission under the Great Seal.

It is now the undisputed Law of Parliament, that the power of judicature, properly so called, resides in the House of Lords. "The proceeding on the Writ of Error (says Lord Coke) is only before the Lords in the upper House, *secundum legem & consuetudinem Parliamenti.*"

The Commons will not deny it to be the *Law of Parliament*, that aids to the Crown and grants of money must begin in their House. And when the Commons, in the great contest with the Lords insisted upon this as their peculiar privilege, and one of their *fundamental rights*; they explained *that* to mean a *constant usage or custom* according to the principles of Parliament. On this occasion it was, they told the Lords, that when they found the contract or record for their exclusive judicature, they would show them indorsed on the same Roll, *that* for the Commons exclusive right to grant money.

Lord Coke, speaking of the Act of Parliament for securing the FREEDOM OF ELECTIONS, occasioned by the foolish commandment foisted into the

Writs, not to choose Lawyers, says, that Act was but *declaratory* of the antient *Law and Custom of Parliament*.

The same Author, when he mentions the antient answer to be given by the Commons, as to new devices for aids to the King, that they dare not agree without conference with their countries, adds, whereby it appeareth, that such conference is warrantable by the *Law and Custom of Parliament*.

Other instances of the Law of Parliament, respect the mode of its *subsisting*.

Of this sort are these, that the Lords and Commons must now sit in separate Houses—that the Commons have the choice of their own Speaker, subject to the approbation of the King—and that the great officer of the Crown who holds the Great Seal, when it is not in commission, has a right by office, to be Speaker of the House of Lords, though he should not be a Peer—That neither House can exercise their own powers, unless the other is being at the time, because each is but a part of the Parliament.

The following are instances as to the form of Elections.

Lord Coke says, “ after the precept for election, “ there ought, *secundum legem & consuetudinem* “ *Parliamenti*, to be given a convenient time for “ the day of election. And any election or voices “ given before the precept be read and published, “ are void and of no force: For the same Electors “ after the precept read and published, may make “ a new election, and alter their voices *secundum* “ *legem & consuetudinem Parliamenti*.”

Under the Law of Parliament also, in somewhat of an inferior sense, is comprehended what is usually stiled the *Course of Parliament*, or the method of proceeding in accusations, petitions, bills, committees and the like; the forms as to all which

are settled by the established usage and custom of Parliament. Therefore Lord Coke, speaking of some antiquated forms, says, "It was the *antient Law and Custom of Parliament*, that when any man was to be charged in Parliament with a crime, the King's writ was directed to the sheriff, to summon the party to appear before the King in the next Parliament." And "for petitions to be preferred into the Lords House in Parliament for the countries aforesaid, this was the *antient constant Law and Custom of the Parliament*, continued until this day." And petitions being timely preferred, have been answered by the *Law and Custom of Parliament*, before the end of the Parliament.

To specify no more particulars; it is the Law of Parliament, that there shall be freedom of speech, and the King's name never mentioned, lest it should restrain debate; and that nothing that passes in Parliament shall be taken notice of in any other court. And it is the great and fundamental Law of Parliament, that the Commons may impeach any subject for crimes against the state, and bring him to his trial before the Lords.

To all these must be added, what, in my own apprehension, has the chief, or rather, the only immediate relation to the present question, viz. That it is the unquestionable Law of Parliament, that the House of Commons are the sole exclusive Judges in all matters concerning their own elections.

But if this last mentioned be the only part of the Law of Parliament, which has any immediate connection with this business, it may not unreasonably be asked, to what purpose we have loaded ourselves, and incumbered our Reader, with so many other examples. We confess it requires an apology; and the answer to the question is this.—

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That we have not done it for the sake of readers of any learning, of whom, we rather beg pardon for the interruption. Such Readers know what the Law of Parliament really is, and are in no hazard of being misled by a mere sound. But the term has been so bandied about, as a kind of *mythical* expression, and the gentlemen who build their whole argument upon it, instead of taking any pains to explain what it means, have so veiled it under a sacred obscurity, that it was really necessary to let it be *seen*, that it might appear from itself, that there is no mystery in it.

The Law of Parliament has been held out as a *specifick*, to cure every objection to all proceedings of the House of Commons, in regard to declaring or inflicting of incapacities, only with a round assertion, that by the *Law of Parliament*, the House of Commons has the right and power to declare an incapacity by their own resolution *singly*; meaning always, that whatever they do declare to be an incapacity, is, and must be so, be it never so much without, or contrary to the *Law of the Land*, and to *Common Right*. This has been so much the case, that it became absolutely necessary, for the sake of those who wish to see the great point in question settled upon it's true foundations, but are not themselves so conversant with constitutional learning, to give a just account of this same Law of Parliament: And we thought it could be done in no way with such satisfaction, as by pointing out from acknowledged authorities, some of the principal, and most material examples of it, in it's different orders and degrees; by which any Reader may see with his own eyes, and judge for himself, upon the authority and analogy of the Law of Parliament, what influence it is of in the present question.

Now,

Now, that this has been done, it may be referred to any one, the simplest we can conceive to be our Reader, what there is in this Law of Parliament, or that can, by any engine, be squeezed out of it, to authorize, or warrant this doctrine, " That the House of Commons can, by it's own resolution singly, make or declare any thing to be an incapacity, or adjudge any man to be ineligible, upon another ground or foundation, beside the Law of the Land."

Admitting, and we do not deny it, that by the Law of Parliament, the House of Commons has the *exclusive* right to judge and determine in all matters of Elections; we only ask, if it would not be as good logick, and as good sense, to argue, that because the House of Lords have also their exclusive right of judicature in matters of Peerage, they might not, by a resolution of theirs, adjudge a Peer, or the heir of a peerage, incapable of sitting in their House, because they were pleased to think he was not fit company for them.

Such a perversion of the *Law of Parliament*, is not more absurd, than it would be to say, that because there is, what is called the *Crown-Law*, (signifying some special prerogatives or privileges, which, for the interest of the publick, the King has in certain legal proceedings) which *Crown-Law*, is as truly a part of the Law of the Land, as the Law of Parliament, or any part of the Common Law is: I say, that because there is such a thing, therefore the King's judges might, in any suit where the Crown is concerned, make any thing they pleased to be Law for the King, and decide contrary to all Law, and to every right of the subject, in favour of the Crown; which would be a tyranny unknown, even under the despotism of the French monarchy.

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To demonstrate that the House of Commons have not the right or power contended for, we join issue upon that very article of the Law of Parliament, upon which alone it is attempted to be supported. For we say, the only power *that* Law of Parliament gives them, is a power of *judicature*, which must proceed *judicially*, determining *according to Law*, and necessarily excludes the power of making Law. We appeal to the very elements of jurisprudence, to testify that *Judges* can only interpret and apply the Law. We call in every known example of the Law of Parliament, to prove that by *it*, the power of the House of Commons, in the instance in question, is bounded by the Law of the Land, and the common right of the subject, and not left to their own will, or to any arbitrary discretion of theirs. We summon up the first and fundamental principles of the constitution, which proclaim with a loud voice, that the House of Commons cannot have the power attributed to them : And that the most essential ideas of the being of Parliament, the widest notions of the unalterable Law of Parliament, exclude it from the whole scope of their most extended jurisdiction and authority.

If, to borrow the words of the Lords in their contest with the Commons about another power, the gentlemen will show us any contract, and record, by which this *beteroclite* power, is, contrary to all principles, rested in the House of Commons by force of some positive constitution ; or, to adopt the language of the Commons themselves, if they will shew us that established custom and usage of Parliament which warrants it ; if our opponents will but point out a single book upon the Law or Constitution, in which it has ever been said, that the power now claimed, is founded in the Law of Parliament, or in any Law of the land, they may say

say something that will deserve an answer. But the first pretensions to power, to power apparently contradictory to principles; pretensions no sooner proposed, than disputed; and pretensions visibly thwarted by the plainest ideas of the Constitution; —These require something more than a mere claim or assumption, something more than one attempt to put them in *Ure*, to procure acquiescence or submission.

The Law of Parliament is not the *Property* of Parliament, or made for them *only*; it is the estate of the subject, and all the people have an interest in it. Therefore it was well said by the Commons in their protestation to Charles the First—" That the liberties, franchises, priviledges, and jurisdiction of Parliament are the antient and undoubted birth-right and inheritance of the subjects of England." And Lord Coke in *his* stile, not improperly says, " The laws, customs, liberties, and privileges of the Court of Parliament, are the very heart-strings of the common-wealth." We are all therefore bound, for our own sakes, to support and defend the just rights of Parliament as we would preserve and secure our liberties, which have also been called the life and blood of the common-wealth, and are the great inheritance of the people, whereof the other is but a part, and a part valuable no farther, than as it tends to maintain the whole. But we must take care that the two go hand in hand, and the one never inroach upon the other.

With regard to the point in debate, the power of the House of Commons as to elections and returns, we have Lord Coke's authority in the place already cited, that the Act of Parliament for securing the unrestrained freedom of elections, was but *declaratory of the Law of Parliament*. His words are worthy to be observed. He tells us " that

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“ strange innovation in the writs prohibiting to
 “ choose lawyers, was wrought by the King’s Let-
 “ ters, by pretext of an *ordinance* in the Lord’s
 “ House. But that at the next Parliament, at
 “ the grievous complaint of the Commons being
 “ interrupted of their FREE ELECTION by those let-
 “ ters, which were (that is in their own nature were)
 “ letters of *Justice* and *Right*, it was enacted that
 “ elections should be freely and indifferently made
 “ without commandment of the King, *by writ*, or
 “ otherwise, or of *any other*, which, says Lord
 “ Coke, was a close and prudent salve, not only
 “ for that sore, but for all others in like case.”

I shall leave this quotation to apply itself in some particular parts. Suffice it here to say, I do not find the House of Commons excepted from among those by whose commandment the freedom of elections was *not* to be restrained. Lord Coke says expressly, that “ he which was eligible of *common right*, could not be disabled by the ordinance in Parliament in the Lord’s House. And an ordinance of the House of Lords was more preposterous than an ordinance of the House of Commons to the same purpose would be, only in this, that elections of members of the House of Commons seem to be a matter quite out of the road of the Peers. But if we would preserve the virtue of Lord Coke’s *Catholicon*; if we would have a sure salve for every sore in a like case, we must maintain this fundamental law of parliament, that was only declared, as he tells us, and confirmed by the ancient statute, that all elections must be free, notwithstanding any commandment of incapacity contrary to law by any power whatever.

A resolution of the House of Commons making incapacities which the law has not made, is but an *ordinance* of that House; at least if Lord Coke understood any thing of the matter it can get no other

other name, for his definition of an ordinance is, "that it wanteth the threefold consent, and is ordained by one or two of the branches of the legislature." By the Law of Parliament, such an ordinance is not of force to bind the people: And it is a good caution which Lord Coke gives, as to the trust and confidence proper to be had in the different branches of the parliament, "always provided (says he) that both Lords and Commons keep them *within the circle of the law and custom of the parliament.*" These indeed are the *repagula juris*, and if either House of parliament break down those barriers, they overleap the mounds of the constitution; they do not simply act without power, but they invade the right of the subject, and commence hostilities against the constitution itself.

If the Law of Parliament is adhered to as the measure of the power of Parliament, every right of the subject will be safe. But if every thing is to be sanctified under the name of the Law of Parliament, which shall at any time be claimed as a Power by either House of Parliament, the whole rights of the nation may be set a-float. That House of Commons which subverted the Constitution, and from whose innumerable disabling Expulsions, the Writer of the *Considerations* has drawn his authorities for *Expulsion-incapacity*—They pretended, in defence, of their ordinance about the Militia, by which the Crown was stript of one of its most indisputable Prerogatives, "that they were thereunto warranted by the *fundamental Laws of the Land.*" Had things been in their natural state, it was a direct attack upon the Constitution; and by not defending the measure upon the necessity of the Case, in an unnatural state of things, they exposed an Act necessary for the defence of the People, to the reproach of being a

wanton usurpation, and a dangerous example of pretension to illegal power.

I am not fond of appealing to any thing said by the unhappy king with whom that House of Commons had to do; being satisfied that his own, and his *wise* Father's arbitrary maxims of Government, which first led them to break in upon the sacred Law of Parliament, were the source of those national misfortunes, which ended in the subversion of the Constitution: Yet many a true word did Charles the 1st, taught by Counsellors more settled than himself, say in his disputes with his Parliament, if he had been sincere enough to mean what others put in his mouth to pronounce, or so well advised, as to act as they made him speak: And I cannot help citing the words of one of his Memorials, which expresses such sound Constitutional Doctrine, as to the Rights of the House of Commons, that assent, I think, cannot be refused to it. "What-
 " ever Privileges (said he) or Liberties they had
 " by *any Law, or Statute*, the same should be in-
 " violably preserved to them, and whatever Pri-
 " viledges they enjoyed by *Custom, or uncontroul'd*
 " and *lawful Precedents*, his Majesty would be
 " careful to preserve."

Law, Statute, Custom, or uncontrouled and lawful Precedent, are the constitutional Pillars of the just power of the House of Commons. But to Votes, Ordinances, or Resolutions in destruction of the Law, and subversive of the fundamental rights of the subject, this language must be applied, though it be the language of an unhappy Prince who died a martyr only to his violations of the Constitution. "Votes—(said he, on occasion of the Militia Ordinance) " which we must de-
 " clare and appeal to all the world in the point,
 " to be the greatest violation of our Priviledge,
 " the *Law of the Land, the Liberty of the Subject,*
 " and

“ and the *Right of Parliament*, that can be imagined.”

All votes, which may in any degree incur such a censure, are not alike dangerous in their effects; but the least hurtful of them, is of evil example. Every vote of a House of Commons, that is contrary to the known Law of the Land, is against the Law of Parliament, for it is the first Law of Parliament, that the Laws of the Land are sacred: And Parliament is either directly or indirectly the fountain of them all. Every vote that attempts to make Law, or that deprives the subject of his *common right*, which is *undoing* the Law, is contrary to the Law of Parliament, because it is the highest Law of Parliament, that one branch of the legislature can neither make nor repeal Law.

Indeed, were it otherwise, how could the House of Commons, as the GREAT CONSERVATOR of the LIBERTIES OF THEIR COUNTRY, thunder out their *Anathemas* against judges who betray the LAWS OF ENGLAND, and bring to condign punishment (as they often have done) the greatest offenders, who have dared to subvert the RIGHTS OF THE PEOPLE.

No votes of the sort we have mentioned, can pretend to a better father (and it is enough to damn them) than the infernal resolutions of that execrable Rump of a garbled House of Commons, (by that time thoroughly purged of all virtue, thro' means of the grand specifick of expulsions and disabilities,) which steeped their hands in the blood of a King, whose tragical *catastrophe*, though he did deserve to lose his Crown, almost turns all resentment from him, to the men who murdered the Constitution under pretence of resisting his attempt to overthrow it. To the resolutions of those men, however, we must do the justice to acknowledge, they were regular and systematical; for they resolved

solved first, “ that the Commons of England assembled in Parliament, had the supreme authority of the nation :” after which it was very easy to resolve, as the next did, “ that whatsoever was enacted and declared Law by the Commons of England assembled in Parliament,” (which by declaring what they did, they manifested themselves not to be) “ had the force of Law, and all the people of this nation were concluded thereby, altho’ the consent and concurrence of the House of Peers be not had thereunto.”

A juster notion of the power of the House of Commons, I will borrow from the words of that very Sir Edward Deering, whose early expulsion by the same House of Commons, the writer of the *Considerations* has celebrated, and from one of those speeches of his, for publishing of which he was expelled, and disabled according to *their* fashion: From which, by the bye, we may judge if the spirit and temper of some of those disabling expulsions, which are quoted from that Parliament, as *authorities* and *precedents* to us at this day. In the debate on the declaration for reformation in certain articles of religion, in which the lords refused to concur, he thus expressed himself.——
 “ The intent of your order to me seems doubtful, and therefore I am bold, for my own instruction to propound two queries. 1st, *How far an order of this House is binding?*” ——
 “ Your orders (I am out of doubt) are powerful, if they be grounded upon the *Laws of the Land*. Upon that warrant we may by an order inforce any thing that is undoubtedly so grounded; and by the same rule, we may abrogate whatsoever is introduced contrary to the *undoubted foundation* of OUR LAWS. But, Sir, this order is of *another nature*, another temper, espec-

“ especially in one part of it, of which in particu-
 “ lar at some other time. Sir, there want not
 “ some abroad, men of birth, quality and for-
 “ tune, such as know the strength of our votes
 “ here, as well as some of us (I speak my own in-
 “ firmities) men of the best worth, and of good
 “ assistance in us, and no way obnoxious to us.
 “ They know they sent us hither as their TRUS-
 “ TEES *to make and unmake Laws*: They know
 “ they did not send us hither to rule and govern
 “ them by *arbitrary, revocable and disputable or-*
 “ *ders*, especially in religion. No time is fit for
 “ that, and this time as unfit as any. I desire
 “ to be instructed herein.”

I am happy such a speech has been preserved—
 the speech of a Member of Parliament, expelled
 and disabled by a House of Commons, but such
 a House as never was before nor since, and I trust
 will never be again; without father, without mo-
 ther, without descent. I love to speak in the
 language of past times, and am much better plea-
 sed to use the words of good men, who have borne
 testimony for the constitution in bad times, than
 to call in Kings, who have wounded and oppressed
 it: Though that character renders *their* witness
 unexceptionable when it is in favour of Law and
 Liberty. For which reason I scruple not, once
 more upon this head, to avail myself of a royal
 Speech found in the Mouth of Charles the II^d.
 whom I should wrong much, or rather should in-
 jure the constitution more, if I cited him as a pa-
 tron or friend of it. That Prince who, as a King,
 did not deserve better, and as a man deserved
 much worse than his beheaded Father, from
 whom he was more distinguished by his levity,
 lewdness and better fortune, than by the virtue of
 sincerity; he too, was sometimes advised, whate-
 ver he meant, to speak a little of the truth to his
 Parliament,

Parliament, and with the Speech in which he opened that held in Oxford in 1680-1, he gives them a piece of council, in doing which, I make no doubt, he spoke more for his own sake, than either for his Parliament's or his peoples. " I conclude (said he) with one advice to you, that the rules and measures of all your *votes*, may be the *known established Laws of the Land*, which neither *can*, nor *ought to be* departed from, nor *changed*, but by *Act of Parliament*: And I may, (added he) the more reasonably require that you make the *Laws of the Land* your rule, because I am resolved they shall be mine."

In what has been said, I hope I shall not be accused of setting the Law of Parliament and the Law of the Land to loggerheads; or of exalting the one in order to put down the other. I intended nothing less; and if I mistake not, neither my argument, nor my authorities required that these two should be at strife with one another. It is my opinion I found them, and I imagine I have left them in perfect harmony together, mutually sustaining and supporting each other. And from the view that has been given of their natural relation and connection, the Reader may, I flatter myself, discover whether the Law of Parliament, as it has been explained and illustrated by examples, either *alone*, (which is the way it is stated on the other side) or *conjointly* with the Law of the Land (in which view I have chosen, and the constitution, I think, warrants us to consider it) does authorize the power contended for in the House of Commons.

The gentlemen have told us, the Law of Parliament is part of the Law of the Land. But for that very reason, it must be consistent with, and not destructive of it: For the symmetry of this beautiful constitution does not admit of parts so
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ill matched, or so ill put together, as to have them cutting one another's throats. The truth is, the gentlemen themselves separate and set at odds the two, which cannot be a true representation of either, though they were necessitated by their argument, to give it as the best they had to offer. They raise up the Law of Parliament to depress the Law of the Land. They make of it, a thing that overtops and tramples upon the other; very suitable to that stile of *mystery* into which they have metamorphosed it. The Law of Parliament overshadows the Law of the Land, and like one of the *arbores gravis umbræ*, with an unbenign umbrage, enervates and causes it to languish. But while we are present with the Law of Parliament, we are not absent from the Law of the Land. Both these luminaries adorn the hemisphere of liberty, and unless the system is *convulsed* by the violence of *domination*, they will not eclipse one another. If they do, darkness and confusion must reign where their kindly rays, each moving in its own proper orbit, should enlighten and cheer, guide and direct.

After all, I am aware it will be said, I have forgot one part of the Law of Parliament, the determinations of the House of Commons, which, as our Authors argue, being the decisions of a Court of competent jurisdiction subject to no appeal, make Law, and constitute, or at least fix and ascertain what is the Law of Parliament, and the powers appertaining to the House of Commons by that Law: And I shall be told I have recognized as part of the Law of Parliament, the *constant usage and custom of Parliament*, upon which the Commons grounded the claim to one fundamental right which I have acknowledged to be just, and I have also cited for *constitutional doctrine* the words of King Charles I. wherein he acknowledges, that whatsoever privileges the House of Commons enjoyed by *custom, or uncontrouled, or*

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lawful

lawful precedent, ought to be carefully preserved. Upon which ground, I have also ventured to give it as my own opinion, that the power of expulsion is so established by usage, custom and uncontrouled precedents, as to have become a part of the Law of Parliament.

It is all true, and I retreat nothing I have said. Here, also, I am ready to join issue with the gentlemen on the other side, and therefore shall now proceed, to the

Fourth, and last ground, upon which it was proposed to try the second branch of the question, and which, as I said, is properly a branch of the last ground, but, as I intimated, I chose to mention it by itself, because of the importance it would be thought to be of, namely, “ the precedents of general resolutions and determinations of the House of Commons, which have been acted, as sufficient to establish a power or authority in the house, by their own resolution singly, to adjudge persons to be ineligible, or to disqualify them to serve as Members of Parliament.”

This brings directly to the consideration of the different classes (of which both the Author of the *Case* and the Writer of the *Considerations* have given us each a list) of persons whom the House of Commons have resolved and adjudicated to be *not eligible* or *disqualified*.

The position of the Author of the *Case*, is, “ that it is by their *resolutions only*, that persons of “ various classes are at this day disqualified;” in proof of which he offers his list: And the proposition is plain and explicit enough to mean, that there is no *Law*, other than that *made* by the *resolution* by which the persons of those classes are disqualified. The Writer of the *Considerations*, is somewhat more ambiguous in this article. He is to show, (as he expresses himself in his 8th page) “ that the House of Commons have at all times, “ without

“ without objection or controul, exercised this
 “ jurisdiction of declaring by their own resolution
 “ *singly*, and without an Act of Parliament, what
 “ the Law is as to the eligibility or disqualification
 “ of Members to serve in Parliament.”

But, notwithstanding the ambiguity of these words, there is, in reality, no difference betwixt this Writer and the Author of the *Case*. And I must beg it may be remembered, that (as has been made abundantly evident) however, the Writer of the *Considerations* in some places expresses himself, he in the whole scope and tenour of his argument, means by the House of Commons *declaring what the Law is, their making the Law themselves*: And if he did not mean this, there would be no sense at all in his reasoning. As to his words just now quoted, they are, whether designedly or not, inaccurate in the highest degree. For it must indeed be a very confused head, that would think of calling for an Act of Parliament to enable the House of Commons, or any other Court of competent jurisdiction, to declare what the Law is, in a case legally brought before them. It is inherent in the very jurisdiction supposed, that they can do this without any Act of Parliament.

But then (and it is here this Writer and we part;) the House can only declare that to be Law, which is so by force of an Act of Parliament, or of some other equal authority, such as the Common Law is. In order therefore not to be misled by this *Aurora Borealis*, instead of minding the Writer's loose and desultory manner of expression, by which he puzzles his Reader, and I am apt to think confounded himself, we must nicely attend to the point he has undertaken to prove, which will appear perfectly to agree with the position of the Author of the *Case*. That is laid down somewhat more clearly and explicitly in the 5th page of the

Considerations, as the second head of enquiry, viz. in these words, “ If they (the House of Commons) had a competent and exclusive jurisdiction to determine the question, (meaning the question lately decided upon) yet, whether they are authorized by the Law and Usage of Parliament, to declare by their own resolution, any person incapable of being elected who is not incapacitated by Act of Parliament?” Where, if the Writer had, instead of the words *by Act of Parliament*, said in general, *by Law*; or if he had added to his own words these others—*or is not incapacitated by the Law of the Land*; the real question he had to consider would have been fairly and compleatly stated. And I beg leave to say, without such an alteration, it neither is fairly stated, nor can be justly argued upon: For an Act of Parliament is not the *only* Law of the Land, and therefore not the only thing by which a person can be incapacitated to serve as a Member of Parliament.

The reason why the Writer of the *Considerations* would not compleat the question, by the addition with which I have supplied his imperfect state of it, will be very obvious, when we come to the classes themselves; because upon this *little* trivial circumstance of the authority of the Law of the Land, all the classes that either he or the Author of the *Case* have cited, most clearly hinge, and the determinations thereupon are fully supported and justified, as we shall presently go on to show.

Two general observations, however, I must premise, before entering upon the Cases; and it is only to recall the attention to the state of the gentlemen's argument. Both of them for ever confound the authority upon which the House of Commons act as judges, or, in other words, the source and foundation of their exclusive jurisdiction, with the rule by which they are bound to determine.

termine. The *Law of Parliament* may be said to be the *former*, but *Law in general*, or the *Law of the Land* is the *latter*. So the gentlemen, and particularly the writer of the *Considerations*, in speaking of their disqualified classes, adopt this sort of expression. "The House determined " what is the *Law of Parliament*, or determined " that this was so by the *Law of Parliament*." But whoever takes the trouble to look into the Journals, will find no such terms used there. In the debates upon cases of incapacity, the phrase used by the Parliament men is, " This is, or " is not warranted *by Law*, or by the *common " Law*." Of which, instances have been mentioned as we went along. An attention to this real distinction, but obvious confusion in the reasoning of both these Authors, will be necessary in the sequel.

The other preliminary observation is this: Though I am myself satisfied all the classes of disqualifications cited by these authors, are capable of being reduced to the Law of the Land, and will be found to be grounded upon it; yet the gentlemen must not understand it to be necessary to our argument, or a thing we are bound to undertake to justify by sufficient grounds in Law, all the determinations in the House of Commons with regard to disqualifications, or any other subject whatever. The last indeed were a task not to be undertaken by any body. But what we assert, and are warranted to maintain, is this, That whether the House determined justly and according to Law or not, the *Law* was the only ground they pretended to go upon in their determinations: We mean the *Law in general*, and not what these Authors are pleased to call the *Law of Parliament*, to which they confine every thing. We affirm the *rule* of determination always was supposed

supposed to be a *Law in being*, antecedent, and external to the House of Commons, and to their own *single* authority; and that they did not pretend merely to *resolve* incapacities, or to make or declare them singly, by force of their resolutions, without, and independent of Law.

These observations premised, we shall take the classes in the order in which they are mentioned by the Writer of the *Considerations*. And his first class is, *Aliens*, which the Author of the *Case* also cites, but says no more of it than this, That it was resolved, the election of Mr. Walter Stewart, being no natural born subject, was void.

To speak properly, and according to the distinctions we took in a preceding part of these papers, this is a case of *want of capacity*, rather than of incapacity. For an Alien, is by state and condition, civilly incapable of any share in the peculiar privileges of the community, not having a civil relation to it. An Alien, if I may be pardoned such an expression, has no constitutional blood in him.

The Writer of the *Considerations* first mentions the question which arose after the accession of King James the 1st. Whether Aliens were eligible, and a doubt then made, if even Scotchmen naturalized, could be admitted to sit in Parliament? But making a leap from that subject, he proceeds to tell us, "That in the debate on the question, whether
" a Scotch Peer could sit in the English House of
" Commons, in one of the most able and most
" constitutional Parliaments that ever sat, no man
" ever doubted the right of the House of Com-
" mons, to determine what the Law was, tho'
" no Act of Parliament existed on the subject."

It must, indeed, have been a very unable Parliament, and very ignorant of the constitution, which could have dream'd of an Act of the Parli-
ment

ment of England, existing with regard to Scotchmen, who were not subjects of the crown of England, their sitting in the English House of Commons, before the union of the two crowns. I should suspect, when the Writer of the *Considerations* composed this paragraph, he was looking upon an Act of Parliament, alluded to in his work, made in the end of Charles the II^d's reign, for excluding Papists, which, by what blunder, I know not, very absurdly binds the Peers of Scotland, to take the oaths thereby enacted.

After the union of the crowns, when any question occurred about the capacity of Scotchmen to sit in the English House of Commons, none but a very unlearned man could doubt of the right of the House of Commons, to determine what the Law was. But still, they could then, as well as now, only determine what the Law in being was, they could not legally make a Law by their resolution; and *tho' no Act of Parliament existed on the subject*, the whole Parliament could never have been so unread, as not to know, that by the Law of England, and indeed by the Law of Nations, one that was not the liege subject of the crown of England, was incapable of the highest trust and privilege a subject could hold or enjoy in the kingdom.

The Writer of the *Considerations*, on mentioning the particular determination cited by the Author of *the Case*, by which a Scotchman, *ante natus*, was excluded from the House of Commons, reasons thus; "It is not, says he, a sufficient answer, to say, this is the Law of the Land: Aliens are disabled by the Law of the Land." And with some air of exultation, rather too hasty, he "begs to know from whence *they* collect this to be the Law, but from the resolutions of the House of Commons?" Adding, "it will appear from
" the

“ the next head, that disabilities created by the
 “ Common Law, and by Law of Parliament, are
 “ not always co-extensive.” To which he sub-
 joins these other un-answerable questions, “ What
 “ entitled Scotchmen *post nati*, to be eligible into
 “ the House of Commons before the union ?” (I
 suppose he means the union of the crowns, tho’
 the single word is now generally used to express
 the union of the kingdoms) “ Was it by Act of
 “ Parliament ? if not, by whom, and on what
 “ foundation was the Law so declared ?”

If I may number myself among the *they* alluded
 to in the first of those questions, I shall freely an-
 swer, it would never have entered into my mind to
collect any thing whatever to be Law, from mere
 resolutions of the House of Commons *as such* ; and,
 at present, I am satisfied, and hope I have said
 enough to show, that all disabilities are created by
 Law, and therefore, that there can be no differ-
 ence as to their co-extensiveness.

But with regard to the other puzzling ques-
 tions proposed by this Writer, I will answer them
 only by asking him some. Did the gentleman
 never hear of the famous judgment as to the *post*
nati in Calvin’s case, as it is called, by which it
 was, upon the opinion of the judges of England,
 in the Exchequer-Chamber, resolved *to be Law*,
 that a Scotchman, born after the union of the
 two crowns, being born within the allegiance of
 the King of England, was, by his birth, natura-
 lized ? I am not now going to discuss the merits
 of that judgment, or the part King James took
 in it, upon which I have somewhere read this sa-
 tyr, “ That such power is in the breath of Kings,
 “ and such soft stuff Judges made of, and that
 “ Lord Chief Justice Coke, by whom the judg-
 “ ment was reported, was fit metal for any stamp-
 “ royal.” It is sufficient for me to say, this was a
 judgment

judgment of the competent jurisdiction (which these gentleman say makes Law, and I only argue is the proper way of trying what the Law is, and applying it) and therefore the Law was to be collected elsewhere, than from the resolutions of the House of Commons.

I might also ask the Writer of the *Considerations*, if, supposing him to be a stranger to the Courts of Common-Law, his parliamentary knowledge has not yet reached to two great cases, adjudged in Parliament within these very few years, in which it was decided upon the Common-Law, that Persons born without the allegiance of the crown, not the children of natural born subjects (who are excepted by Act of Parliament) are, in respect of their *state*, and by the fundamental principles of Law, as having no natural allegiance to the country, incapable to take, by purchase or inheritance, lands in England; yet *there never existed an Act of Parliament upon the subject*? But surely he does know the Act of Succession, which excludes foreigners even *naturalized*, from sitting in Parliament, which supposed that before that Law, a person naturalized could sit, as in fact they did; and one noble Earl yet remains in possession of a seat in Parliament, by the capacity derived from, and enjoyed under the former state of the Law. He likewise must know from the Statute-Book, as well as the Journals, that Acts of Parliament have been made to remedy difficulties in succession, to which natural born subjects were liable from defect of inheritable blood in their ancestors and relations, who were foreigners.

If the Writer were a learned man, he would know from the books upon the Publick Law, that the Law of England, in this respect, is but conformable to the Laws of all other civilized nations, which have no particular constitutions to the con-

trary. And, upon the whole, I think it may be concluded, that the incapacity of Aliens to sit in Parliament, is an incapacity by the *known Law of the Land*; and that when the House of Commons adjudged Aliens to be incapable, they only determined *according to Law*, and did not, by their *resolution singly* without a Law, make a Law of incapacity by their own authority, or adjudge a person to be ineligible who was not *incapable by Law*.

The next class is that of *Minors*, which the Author of the *Case* is wise enough not to mention, and had probably too much Law to meddle with: And indeed to enlarge upon this case, unless to prevent this Writer from saying he is not answered, would really, methinks, be to insult the lowest understanding; for this is a *natural* incapacity, founded in nature. If a *Minor*, and a *Major*, or one of full age, are, as they certainly are, contradictory terms; it is a contradiction in terms, to say that a Minor may *be*, or may *do* what a Major *only* is capable of being or doing. In what country under the Sun, where there is any Law at all, is not minority an incapacity in civil life? The Laws of particular countries only fix the term of minority: And Scripture itself, speaking according to the Law of Reason, tells us, the heir, while a child, is under tutors and governors until the time appointed.

The gentleman says, "We all know that 'till the " Act of the 7th and 8th of William III^d, the practice of Minors sitting in Parliament universally " took place." I wonder how many Minors this Writer knows, or thinks every body knows, to have ever sat in Parliament; for he speaks of a case that must have been very *uncommon*, as if it had always existed, and every day occurred. Yet he has produced but one precise decision on the point; and however often it may have happened,

and been overlooked, the Law was not thereby hurt or altered.

The incapacity of minority does not stand only upon the opinion of some great lawyers, as this Writer would seem to insinuate. Every lawyer has said it: Every law-book contains it; and there never was a Minor who did not know it to be the Law. Let our Author but look to Lord Coke's treatise on Parliament, he will there see, it is numbered among the transcendent powers of it's jurisdiction, that it can, by an Act of Parliament, adjudge an infant or minor to be of full age, as he also says it is to make a mere Alien a subject born.

The reason of ever proposing or passing a clause in an Act of Parliament on this head, such as is in the statute of the 7th and 8th of King William, could only be, as is often done, to confirm and render effectual the Common Law, by inflicting severe penalties, which the clause does; and also to make an end of that abuse of the House of Commons, by determinations of theirs, in particular cases, granting in effect, to Minors, the *veniam ætatis*, as to sitting in Parliament, which was flagrantly against Law. But to argue as this Writer does, from such a clause in a statute, that, before that Act, Minors were not incapable by Law, is no better reasoning, than if the Author wrote to endeavour to persuade us, that polygamy was the Law of this country, when the bill was passed in James Ist's reign, to restrain persons from marrying again, while their husbands or wives were alive.

When the gentleman cites the single determination, by which a person, acknowledged to be a Minor, was declared duly elected, let him compare that with other cases, also quoted, for a different purpose, adjudging that a person voted for by a *minority* was duly elected, when the majority

gave their votes to one under a *legal incapacity*. Does he think a determination allowing a person attainted to be duly elected would be good Law, or Law of Parliament? But I shall only ask him, if the decision he cites *for* the Minor, is the only arbitrary, absurd determination any House of Commons ever made? *We have all* heard, since our Author will speak in the name of *all*, of their voting a Church out of a town at one time, and voting it into the town the next, for Election purposes.

As to all such determinations, the lines applied by Lord Coke to an Act of Parliament passed to attain a subject of High Treason, without regard to that essential Law of natural justice to hear him, are the only proper answer,—*auferat oblivio si potest; si non utcumque silentium tegat!*

Instead therefore of “its appearing (as our Author says,) from this single determination, that disabilities by the Common Law, do not always operate as such by the Law of Parliament, and that of this difference, the House of Commons are the sole Judges, and that in cases, however unfit and inconvenient, the Law, as they have declared it, cannot be altered but by Act of Parliament.” Instead of this, I say, it in truth only appears, which is no new discovery, that in some *past* times, the House of Commons has arbitrarily shaken itself loose of the incumbrance of all Law whatever, and perhaps sometimes of all reason with it. But the difference suggested by our Author, between the operation of disabilities by the Common Law, and the Law of Parliament exists no where but in his imagination: And this doctrine that the Law, as declared by the House of Commons, cannot be altered but by Act of Parliament, is so far from being true, that the House itself, by the variation of their decisions,
till

till restrained in that article by Act of Parliament, has contradicted it in hundreds of instances. In itself the doctrine is too gross to be swallowed by any one who knows the least of the Constitution, or of the Law, or the powers of the House of Commons.

The Writer of the *Considerations*, for his third class, says, "The next description of persons disabled to sit in Parliament *by Law*, are the Clergy." And this class is barely mentioned by the Author of the *Case*, with a reference to the resolutions of the House. But if the Clergy are, as the Writer of the *Considerations* states it himself, *disabled by Law*, the case has nothing to do with the argument: And it is clear the House did not, in excluding the Clergy, make a Law singly by their own resolution: They only declared what the Law was, and determined *according to Law*. There is no doubt of it, that this also is an incapacity by the common Law; or we cannot from books or authorities, or usage and custom, know any thing to be the common Law, no not that an eldest son is an heir.

The fact is, the Clergy had their own Parliament or convocation which was part of the constitution of the Kingdom, called by the King's writ, in which the Clergy were all present in person or by representation, and taxed themselves, and the Members enjoyed the like personal privileges as the Members of Parliament: They could not be Members of the House of Commons, the great foundation of whose constitution and power, is the right of taxing the people, which did not extend to the Clergy. And though the right of taxing by the convocation was given up in Charles the II^d's reign, which has made convocations of less consequence since; yet the convocation itself still subsists: And no instance is alledged of an election of
a Cler-

a Clergyman as a Member of Parliament, since the change was made as to the power of taxing in the convocation. The last resolution cited on a claim of that sort is in 1661, and it was not till 1665, that the Clergy gave up their right of taxing themselves: Before which it was manifestly absurd and against the constitution, for Clergy to pretend to sit in the House of Commons.

So Lord Coke gives as the reason of the incapacity of Clergymen (of which he speaks as he does of that of Minors and Aliens, without the surmise of a doubt, thus; "because they are of another body, viz. of the convocation." And he only takes it from the resolutions of the House of Commons. The words, as quoted in the *Case* are, "that Alexander Newale, being a Prebendary of Westminster, and thereby having a voice in the convocation, *cannot* be a Member of this House."—Which evidently imply the cause of exclusion to be founded in the common Law and constitution of the Kingdom: And shew it was not an incapacity merely by an arbitrary resolution of the House of Commons.

Our Author might have spared himself the trouble of his remark, "that *under these decisions of the Law of Parliament*, (as he calls the resolutions in particular cases as to Clergymen) "without an Act of Parliament, the Clergy have acquiesced." In truth they have acquiesced only in the *Law of the Land*: And our Author spoke more properly than he does in this sentence, when he set out with saying, as above observed, that the Clergy were *disabled by Law*, instead of being disabled by, what he here calls, *decisions of the Law of Parliament*; a term I do not well understand.

If it were necessary on this head to add to clear authority, one affecting to reduce things to their first principles

principles might, without extravagance, say, there seems to lie something very like, or near akin to a *natural* incapacity upon the inferior Clergy, who, by their temporal possessions bear no such immediate relation to the Crown, or to the constitution of Parliament, as the Lords Spiritual have their antient Baronies, which is understood to be the foundation of their seat in the House of Lords. It is an incapacity founded in the nature and reason of things, which is the first and highest of all legal incapacities. The subordinate Clergy, by the *indelible* character with which they are cloathed, are supposed to be *necessarily* and *perpetually* employed in another vocation, in such a manner, that they cannot do the duty of a Member of Parliament. They are by office, and by oath engaged in the service of another master, whose claims are paramount to all others, in virtue of the unalterable vow, by which they have lawfully devoted themselves to his work. They live at the altar, and ought to serve there; that being the duty even of their civil relation to the state, in the sphere in which they have inrolled themselves of free consent, and from which they cannot, by an act of their own, be discharged. It is to such a natural incapacity or *repugnancy*, that the allusion, I apprehend is, when it is said in the course of the debate as to the Attorney General in 12mo. Jac. 1st—"that never any Master of the Rolls was of the House 'till 26 H. 8th, because, before, all Masters of the Rolls, 'till then, were in *holy orders*, and so could not be of the House."

The fourth class mentioned in the *Considerations*, but not taken any notice of in the *Case*, is that of *Ambassadors*. But the slightest attention will satisfy any one, that this case is totally foreign to the Writer's own purpose, not singly, because the
House

House of Commons have never resolved persons of this character to be *disabled*, which makes the resolution upon the head, no authority to the point in hand ; but because there never could be a colour for pretending it to be an *incapacity* or *disability*: And as for its being, as the Writer of the *Considerations* says, a precedent for the right of the House of Commons *to judge and determine* upon all disqualifications and incapacities, we require no authority to this purpose, because we agree it to be of their competent, inherent, and exclusive jurisdiction.

In the first place, with regard to ambassadors chosen or sitting in Parliament, they are necessarily supposed to be possessed of the legal *capacity* of eligibility ; and that they are not by any Law, or any Act of the Law, disabled or incapacitated. The utmost that can be said, is, that from their present situation it is impossible they can attend their service in Parliament. And on the other side, the impossibility is at best but temporary and uncertain, as their employments may last for a month, a session, or a year; or not so long as either. There could, therefore, be no pretence for declaring them *incapable* of sitting even in a *present* Parliament. And if the House of Commons had ever resolved, that the office of Ambassador, deprived a Member of his seat, it must have been by some form or mode of sentence not yet known, as expulsion would have been a most incongruous one ; and the method of issuing a new writ, as in the case of accepting an office, which now by special statute vacates a Member's seat, is founded on the statute, and applicable only where it operates.

But the argument may be very short on this point. As there is nothing in the Common Law that insinuates this to be an incapacity; so the reason

reason of the thing manifests, it never could be construed as such. And this sufficiently appears from the old general resolution of the House of Commons in 1585, against amoving (as it is called) Ambassadors; For it is not confined to *their* case, but with them are joined in the resolution, persons in *Exetution*, or visited by *Sickness*; as to whom we see, anciently, questions had been stirred, which, to make an end of all doubt, produced at length that general resolution, most consonantly to reason, declaring that persons in any of these situations, should not in any wise be removed from their place, nor any other elected in their stead; the reason of which tells itself, that the situation of Ambassadors, and these other persons, was but a *temporary* interruption to the duty of Parliament.

At the same time, I apprehend there can be no doubt but the House of Commons has, by the Law of its constitution, an inherent power (which therefore is, and must be according to the Laws of Parliament;) to enforce and secure the attendance of its own Members for the sake of the *publick*, as well as for the interest of the particular constituents: And consequently, if any member were unreasonably, and without just excuse, to absent himself from Parliament, it would be a good ground of expulsion, in order to let the electors into a new choice.

Nay, the pretence of the King's service might not, under all circumstances, be deemed a sufficient reason to preserve a *non-attending* Member in possession of a seat, for a length of time inconsistent with the ends of representation, and the duty every member owes to his constituents, and to the whole community. So upon the 23d of March, 1623, " Mr. Chubb, Burgess for Dorchester, having writ-
" ten a letter to the Speaker, desiring to be ex-
" cused his attendance at the Parliament, for that

“ he was employed in his Majesty’s special service,
 “ Mr. Speaker moved to understand the opinion
 “ of the House ; *which was clear that he ought*
 “ *not to be excused* : Yet the case was further refer-
 “ red to the examination of the General Commit-
 “ tees for *Returns* and Privileges.”

Upon such a ground as this, however, only could the thought of turning Ambassadors out of the House ever have been entertained. And, on the other hand, it must occur without being suggested, that as Ambassadors are absent, and only occasionally so, on the publick service, the cause of their absence, if not of such continuance as to be absolutely incompatible with the trust of their constituents, must be a good excuse, as they are doing the duty of their allegiance in that character and station, which, for a time, suspends their attendance on Parliament. It is superfluous, therefore, to add, what any one, who has dipped into the Publick Law, knows from the municipal constitutions of antient states, the most famed for their civil policy, that those who were absent *reipublicæ causâ*, instead of losing any right or privilege they had, were favoured, on account of the service they were engaged in abroad, with extraordinary immunities at home.

The conclusion is, that this wise and constitutional determination (as the Writer of the *Considerations* properly enough calls it) by which the House of Commons declared Ambassadors not to be incapacitated, was as much a decision within the bounds of Law, and agreeable to the Law of the Land, as any one by which they ever adjudged persons of any particular class to be ineligible. It is founded on the principles of the constitution, and the rules of the publick Law. Nor have the grounds of the determination any particular relation to, or dependance upon the Law of Parli-
 ment ;

ment; to which the Writer of the *Considerations* would obliquely refer it, when he closes this article with saying, " it appears from the ancient debates among men of the greatest parliamentary abilities, that, at that time, no man ever dreamed that the House of Commons had not a right to determine what the Law of Parliament was, though no Act of Parliament had ever been made on the subject."

This is only one of the usual deflections in the reasoning of this Writer; for, in the preceding article, and in other places, he speaks of determining what the Law, in *general*, was. But by opposing the Law of Parliament to an Act of Parliament, as he does in this place, he means (and it is his constant aim,) to hide all other Law but these two, thereby to reduce every incapacity, not created by Statute, to the Law of Parliament, of which the only idea he is willing we should entertain, is that of a Resolution of the House of Commons.

The fifth class, and which is also mentioned by both the authors, is that of Sheriffs and Returning Officers. All that the Writer of the *Considerations* pretends to observe upon it in the way of argument is, that whenever the question, " as to the eligibility of the persons of this class has occurred, the House of Commons have been considered as the only Court having a right to determine *the Law*." In answer to which, we can only repeat what has been so often necessary to be said, that this makes no sort of application of the authority alledged to the question really in debate; which is not, Whether the House of Commons has the right to determine the Law; but if, under colour of determining, they can by their Resolution make the Law instead of pursuing it?

We apprehend the determinations, as to this class, do, as little as any other that is cited, prove

that it is the Resolution of the House which makes the Law, or constitutes the incapacity. On the contrary, it appears to us, that the Law of the Land is the ground of the determination. One thing is certain, that in all the debates on the subject, *the Law*, and not the power, or authority of the House of Commons, is on all hands appealed to, as the test for trying the objection; and the power of the House to exclude by a mere resolution, is never once mentioned, though that would always have been the shortest road to an end of the debate. It is remarkable even, that in the debates upon other questions of incapacity, particularly with regard to the Attorney General; *Sheriffs*, and *Persons in Holy Orders*, are set up for illustration and proof of the Law, as analogous and parallel examples of exclusions *by Law*. The language in the House on that occasion was this, "None to be excepted *by Law*, but *Sheriffs*, in *Orders*, and *Judges*."

The case of *Sheriffs*, and other Returning Officers, differs from any of the foregoing; it is neither a case of *incapacity*, nor *want of capacity*, but rather a defect of the means of a legal return, or a want of the means of a legal election, arising from a casual situation by office, which renders it impossible for persons of that character and description to be duly elected; because they are the judges of the election; or to be duly returned, because they are themselves the Returning Officers, and according to the notions of Law, which in this very instance are also founded in natural reason, cannot return themselves.

That it is not an ineligibility, which is the ground of the objection, and the foundation of the determination upon it, is clear from this, that Mayors, and other Returning Officers in Boroughs, might be elected, returned, and sit for any other place, except

cept that of which they actually were the Returning Officers at the time of the election; and it is an adjudged case, that the seat of a member of Parliament was not vacated either by his being chosen a Mayor, or appointed Sheriff of a county.

“ 20th January, 1628, A motion was made that
“ Mr. Lynn being chosen Mayor of Exeter,
“ might be discharged, and a new chosen; but
“ ruled, that being a member of the House be-
“ fore he was elected Mayor, he ought to serve.”

The same was resolved 25th January 1605, as to Sir Jo. Peyton returned for Cambridgehire, and afterwards appointed a Sheriff; which shews that neither a Sheriff, nor a Mayor, is ineligible, or incapable of sitting in Parliament, on account of being actually in office.

It is acknowledged, that Sheriffs are now legally chosen, even when they are in office, for any other place but the county of which they are Sheriffs; though that was anciently made a question, because of the clause in the writ prohibiting the Sheriff to return himself, or any other heriff. This, it is admitted, has become obsolete, and lost its force, like the objection of *non-resiency*, and other things, which Lord Coke calls merely *directory*. But this last was not so clearly settled to be the Law at the time of Sir Edward Coke's case, in 1625, mentioned in the *Considerations*; when, however, the House would not turn out Sir Edward, though they avoided an express determination on the point; it having been determined the contrary way not many years before. Such a sort of thing would the *Law of Parliament* be, if the contradictory decisions of the House of Commons constituted it.

The objection, therefore as has been said, is merely to the *Election* itself, and to the *Return*. Or, to vary the expression once more, it is to the possibility in this case of particular persons being duly elected, and to the power of particular persons

sons to make a legal return. Which is plain from the terms of the resolutions upon the head. "Resolved, (June 2d, 1685,) that no Mayor *can* *duly return himself* to serve in Parliament for the same Borough of which he is Mayor at the time of the election."

Resolved, that no Mayor, Bailiff, or other Officer of a Borough, *who is the proper officer* to whom the precept ought to be directed, is capable of being Elected to serve in Parliament, for "*the same Borough of which he is Mayor, Bailiff, or Officer, at the time of the election.*"

And, in the Cases adjudged upon the ground of these general resolutions in the same year, 1685, the writs are ordered to be issued "in the room of (such a one) who was Mayor of the said town, and was the *proper officer to whom the precept was directed, and who returned himself.*" From all which it is evident, the objection is, in reality, not to the *Member* chosen, or to his capacity, but to the capacity of the *returning Officer*; which is as effectual to vitiate or void the return, as an incapacity in the person elected and returned, rendering him strictly ineligible.

Thus much being said to bring the objection to it's true level, I apprehend it is not very difficult to make it appear that this is an objection, call it incapacity or by what name you please, *of the Law*. I say it is an objection of the Law; and it is here the argument ought to meet the Case. It is an objection which owes it's origin and force to the *Law of the Land*, and *not* to the authority of Resolutions of the House of Commons: which last is the point the gentlemen have to prove, and in proof whereof they have alledged this class as an authority. The House of Commons have only in this as in other cases, by their Resolutions and Determinations, applied and given effect to the objection which is built upon *Law*,
independant

independant of the House of Commons, and a binding rule for their decisions.

When I say the objection, and consequently the determinations upon it, are founded upon the Law of the Land, I lay out of the case altogether the old and antiquated Act of Parliament, or ordinance as Lord Coke calls it, disabling Sherriffs in 46 Edward 3d, mentioned in the *Considerations*, which would, if admitted as statute authority for the incapacity, leave no room for the question in debate, so far as it relates to Sheriffs. By thus putting them, and Mayors and other Returning Officers on the same footing, we at once answer this question of the Writer of the *Considerations*, "What do you say to the situaion of Mayors, Bailiffs, and other Returning Officers, against whose eligibility there is no pretence of an Act of Parliament?"

It might, as to Sheriffs, be sufficient to say, that the prohibition in the writ of election is part of the *common Law*, because the writ itself is so, and cannot therefore be altered but by Act of Parliament. This is Lord Coke's doctrine, and he is a better authority than Pryn, who has disputed the point with him, as he has done many others, in which his political opinions, made him to differ with Coke. If the writ is allowed to have the force of a writ of the common Law, it is indisputable that it cannot be altered but by statute, or by such a prescription as has rendered obsolete part of the writ, in the form in which it now stands. For this we need no other authority than the statute book, by which we see, that an Act of Parliament was necessary to destroy such a monster as the writ, *de Hæretico comburendo*. And as that part of the writ of election, containing the prohibition of Sheriffs to return themselves, continued after the ancient Act of Parliament made to secure the freedom of elections, in opposition

to

to the innovation made in the writ, by inserting the absurd prohibition to choose Lawyers, it is thereby the more strongly confirmed, as a part of the common Law. This article having also *retained* it's force, when the other part of the writ, commanding not to return any other Sheriff, has confessedly become obsolete and of no effect, the confirmation is still farther strengthened.

With regard to Mayors, and other Returning Officers of boroughs, though the writ is not immediately directed to them, yet as the Sheriff's precept, which is their warrant, is only a mediate communication or transmission of the command of the writ, it may be thought to carry with it the quality of the writ itself, it being considered as an incongruity that the writ should, in it's conveyance, lose any of it's virtue, or that the precept founded upon it, should be broader than itself. In this way the restraint affecting the Sheriff as a Returning Officer, may be thought to go along to the Mayors, and other proper officers of the boroughs, acting in the same capacity. So the Law, and the Resolutions of the House of Commons, uniformly consider Mayors, &c. as the Returning Officers, and in the Resolutions, they are described as the persons to whom the execution of the precept belongs, and they are on all occasions treated and dealt with as the Returning Officers, in statutes, and by the House of Commons, and the Courts of Law. Upon this ground the Law is the same, as to the Sheriff, and all Mayors, and other Returning Officers of boroughs, though these act only in some respects subordinately under him.

But if there were no authority in the writ of election, as a part of the Common Law, the objection is founded upon the principles of reason and natural justice, which are acknowledged grounds of the Law of England. Returning officers

ficers are not merely *ministerial*, but have a *judicial* part of the act in all elections. They judge of the votes, and, in the first instance, adjudicate the merits of the election, and by their return as a verdict, the seat is conferred. Now, if it be Law that no man can judge in his own cause, how can a Returning Officer return himself, that is, *judge* for himself. How can he judge between himself and other Candidates, or between himself, and the Electors. That is Common Law, it is the Law of Nature. An Act of Parliament to make a man judge in his own cause would be void. The Lord High Chancellor of England, rather than judge in his own cause, must devolve the jurisdiction of the Great Seal even upon the House of Lords.

No other answer is necessary to what the Writer of the *Considerations* says, that by the Act of Henry the 6th, a Returning Officer must return himself, if he has the majority of votes. That supposes an ordinary course of things, and for further reply, *vide* the adjudication as to Colonel Lutterel's election.

Mr. Serjeant Harris, like a lawyer who gives the colour of his profession to every thing, upon one of these occasions, put the ground of the objection upon the very form of the Indenture of Return, "We know, (said he,) a man cannot make an Indenture to himself, no more can he here between himself and the county, for there are required two persons."

But before dismissing this article, I will make one observation, and chiefly because it leads to a point of general doctrine. Returning Officers are the servants of the House of Commons: And the House, as having elections under their particular care, may make regulations that do not affect the essence of the election, but in the nature of Bye-Laws, with respect to the manner of proceeding

in an election. Of this sort was the interposition of the House pending the late election of Middlesex.

Nobody could find fault if the House were to resolve that the Serjeant at Arms attending the House, as their servant, was incapable of being elected a Member, or that a Clerk of the House of Lords, or the Gentleman Usher of the Black-Rod could not sit as a Member of the House of Commons. *Compatibility* and *incompatibility*, the Law will take notice of, as well as of capacity and incapacity.

So in the 7th of James I. Mr. Bowyer, a Member, having been appointed Clerk of the Parliaments, he was removed; and the reason assigned in the Journals is, that by his oath he was bound to attend in the Upper House, and was not to understand the secrets of the House. An honourable gentleman, who now makes a great figure in Parliament, sat long at the Clerks table in the House of Commons, and, and I dare say, neither himself nor any body else, ever thought he could have procured himself to be returned a Member, and have continued in his office as Clerk, so as to rise from the table when he thought fit, and take a share in the debates, and then sit down again to write his minutes. Yet he had all the while the strict capacity of being eligible, as much as any other man in the kingdom. He changed his situation, and now sits as a member, so much to his own credit, and the advantage of the publick. That is the difference between incompatibility and incapacity.

The House has a peculiar jurisdiction, even over its own Members. I do not say it can deprive its Members of their common right, but it may restrain them as to rights, which interfere with their situation and duty as Members, either in point of attendance

attendance, or independence. Thus I apprehend it was a very legal resolution which a virtuous House of Commons came to, penetrated with a sense of the evils of the long pensioned Parliament. After ordering the papers to be laid before the House, which related to the Members thereof, who had received allowances out of the secret service money, they resolved 30th December, 1680, *nemine contrariante*, " That no Member of this House shall accept of any office, or place of profit from the Crown, without the leave of this House, nor any promise of any such office, or place, during his being or continuing a Member of this House." And, " That all offenders herein be *expelled* this House."

In proof of Lord Coke's observation, that no good motion was ever made in Parliament, but it took effect some time or other, this very Resolution was afterwards enacted, first by the statute of the fourth and fifth, and afterwards by that of the sixth of Queen Anne, which provides, that if any Member of the House of Commons shall accept of an office from the Crown, his election shall be void, and a writ shall issue for a new election: Whereby the salutary object of the Resolution of 1680 no longer depended upon the discretion of the House of Commons, either for renewing the Resolution, or for granting, or refusing leave to accept of offices. What a Resolution of the House of Commons *could not do, in that it was weak through the want of legislative powers*, a statute did, by making what they intended by their Resolution a *perpetual Law*; with this other advantage at the same time, that it made an easier exit for a *placed* Member, without voiding his seat by the disagreeable circumstance of an expulsion.

Such a resolution, however, was the only remedy for the evil, while there was no Act of Parliament; and it did not, I apprehend, exceed the jurisdiction of the House of Commons over its own Members. Nor will the argument I am now engaged in, suffer me to omit observing, how carefully the sanction annexed to the Resolution, is confined within the bounds of the constitutional powers of the House of Commons. They resolve that the offenders, as they are called, shall be expelled. But they do not resolve that the offenders against their Resolution, shall be *disabled* to sit in Parliament upon a re-election.

Such a Resolution would indeed have been highly absurd, as it would have been resolving, that persons holding offices under the government should be incapable of being in Parliament, although there were Members sitting at the very time in the House, who were in office when they were chosen. And no Parliament ever did exist, into which servants of the Crown were not elected. So that they might as well have resolved at once to expel all placemen who were then Members, and thereafter to have admitted none who were in offices of trust; which would have been an incapacity, with a vengeance, by a *Resolution*, and would have added one class more of disqualification to those our two Authors have given us, and that the most brilliant of them all.

But the House of Commons in 1680 knew better things. Not like the Parliament in 1640, that *expelling, disabling, and ordinance-making* Parliament, which began with extending their own powers, and ended with annihilating every power but their own usurped dominion, voting out of existence both the King and the House of Lords; not like them, the House of Commons 1680, kept within the line marked out by the true Law of Parliament.

Parliament. A power to expel they knew they had, and that thereby the constituents would be divorced from a Member who had prostituted himself to the Crown, and would be free to choose another, when they thought him unfit to be longer trusted as their Representative. But to a power of *disabling*, thereby to cramp the freedom of election, in case the constituents thought their former Member worthy of their trust, notwithstanding his having accepted a place, which might be with their consent, though without leave of the House of Commons;—To such a power they did not pretend, notwithstanding all the examples and authorities which our two Authors quote to us at this day, and could, if they had been Members of the Parliament 1680, have quoted to the House of Commons at that time, from the Parliament of 1640.

That the House of Commons in 1680 entertained no idea of a disabling power in them, is evident from this consideration, that the same reason that led them to resolve that a person should be expelled for accepting a place, would have also moved them to disable him from being again elected, as the cause of expulsion implied the opinion of the House, that a person who had surrendered himself to the influence of the Crown, was unfit any longer to be a trustee for the people.

The Statute of the 4th and 5th, and that of the 6th of the Queen, keep the same constitutional line with the Resolution of 1680-1. For though the Parliament undoubtedly could have made an Incapacity, as well as a voidance of the Seat, in every case of accepting of a Place, as it has actually done with regard to some Offices, yet they are not only stopped with declaring the Members election void, leaving him capable, as of common right to be re-elected; but an express proviso is added,
 declaring

declaring that he shall be capable of being again elected as if his seat had not become void. This was certainly not necessary, because the Common Law would have secured that, but it was very proper to make it clear by an explicit declaration, that there might not be room for a doubt or question upon the subject.

The observation which has been made does not, however, exhaust all that is to be extracted out of the Resolutions of 1680, to which we have referred, material to our present purpose. For, according to the doctrine we have in this essay been combating, Incapacity is the necessary effect of Expulsion : And therefore any Member expelled under the sanction of those Resolutions, was, of course, disabled to be re-elected into the same Parliament. The Parliament in which the Resolution was made, was dissolved a very few months after the date of it ; and it does not appear from Journals, that the Resolution had any actual consequences.

Be that as it may, there is no need of the fact to argue upon, for the Resolution itself is authority sufficient to say, that a Member might have been expelled, by virtue, and in consequence of it. And a Member so expelled must, according to the doctrine of our two Authors, necessarily have been incapacitated for that Parliament which expelled him.

Such an incapacity might have gone as far as government offices reach, which is no short way. This would have been a most powerful example for illustrating the position of the Author of the *Case*—" That the House of Commons have adjudged persons incapable of being elected up-
" on general principles of constitutional policy."
It is so much more proper than any one instance
he

he has produced, that I wonder how he omitted it.

Now I would only ask the gentlemen, If they really think, or take upon them to maintain, that a Member expelled under this Resolution of 1680, would, *ipso facto*, have been disabled and incapable of being re-elected into the same Parliament? If they answer *no*; they must give up their doctrine of implied or necessary incapacity. If they say *yes*, they must admit that, with an ill-humoured or factious majority of a House of Commons, the most meritorious men in the kingdom might have been incapacitated to sit in Parliament, for the very reason which, of all others, best qualified them to be there, and made it most for the good of the Common Wealth that they should be Members: And consequently, that either Government must have been deprived of the best abilities in the land, when the publick service, and perhaps the safety of the state require them, or the People of England robbed of the most worthy Representatives.

This, I own, is a situation of things to bring the country into, to authorize which I should require a higher authority than that of a Resolution of the House of Commons.

But the foundation and force of this argument, is not confined to the Resolution of the House of Commons, in 1680. It is further strengthened and illustrated by the provision of the first Act of the 5th and 6th of K. William and Q. Mary. By that statute it is enacted, " That no Member
" of the House of Commons, shall be concerned
" in the collection, or management of the duties
" granted by that Act, or that should thereafter be
" granted by any other Act, except the Commis-
" sioners of the treasury, and customs, and ex-
" cise." The clause is merely *prohibitory*, without
any

any positive sanction annexed to it, declaring the seats void, as was done by the after statutes of the Queen, in the case of a Member accepting of any office whatever from the Crown. Nor is there any express provision that a person concerned in these duties, should be incapable of being elected or sitting in the House of Commons, otherwise than as the provision, that no Member should be so concerned, virtually implied an exclusion from the House of any person under that predicament.

Under this provision of the Act of W. and M. many Members were expelled for being concerned in the duties granted by that and subsequent Acts of Parliament, and the proceedings of the House upon these occasions varied a little in form, though substantially they were always the same. In the first instances in 1698, the House Resolved, That the Members, having been concerned, &c. *contrary to the Act* of the 5th and 6th, &c. *be expelled this House*. In other instances further down, as in 1700, the House proceeded, by resolving first, That the Member having been concerned, &c. *was guilty of a breach of the said Act* of the 4th and 5th of K. W. and Q. M. and then resolved, That the Member, *for the breach of the said Act*, be expelled this House *.

Now,

* The following are all expulsions in consequence of the provision of the Act of the 5th and 6th of W. and M.

Feb. 10, 1698. James Isaacson, Esq; Member for Banbury, expelled.

13, 1698. Henry Cornish, Esq; Member for Snafestbury, expelled.

14, 1698. Sir Henry Furnese, Member for Bramber, expelled.

Eod. Die Samuel Atkinson, Esq; Member for Harwich, expelled.

20, 1698. Richard Woolaston, Esq; Member for Whitechurch, expelled.

In these Cases there was but one Resolution of the House, viz. that

Now, that a Member so expelled was incapable of being again elected, while he held the office for which he was expelled, may be legal reasoning enough, because the prohibition of the statute is, that no Member shall be so concerned, which, as already said, implies an exclusion. But if the person expelled gave up his office, he then came to stand upon the same footing, that a person expelled under the Resolutions of 1680 would have done. And therefore, the question which we put upon a Case supposed under the resolution of 1680, may be put upon the Cases under the Act of W. and M. Whether the gentlemen think that a person expelled for a breach of that Act, or for acting contrary to it, but afterwards giving up his office, and thereby taking himself out of the circumstances which brought him within the Law, would then have been incapable of being elected into Parliament, merely because he had been expelled the House; which could be the only pretence of an incapacity affecting him after he had given up the place, the holding of which was, by the statute, rendered incompatible with being a Member of the House of Commons?

The Gentlemen themselves have given an express answer to the question, as to the Case stated

that the Person being a Member of the House of Commons, and having since been concerned and acted, &c. *contrary to the Act made in the 5th and 6th years of his Majesty's reign, for granting several Duties, &c. be expelled this House.*

Feb. 19, 1700. Sir Henry Furnese, Member for Sandwich, expelled.

20, 1700. Sir Gilbert Heathcote, Member for London, expelled.

In these Cases there were two Resolutions of the House. One, that the Person having since his being elected a Member, been concerned and acted, &c. *was guilty of a breach of the Act, made in the 5th and 6th years of his Majesty and the late Queen.* By the other, it was resolved, that the Member, *for the breach of the said Act, be expelled this House.*

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upon this Act: And their answer is, That a person, though expelled for breach of that Act, if he afterwards gave up his place, was not *incapable* of being re-elected. For they have argued, that Mr. Woolaston, who was one of the Members expelled for acting contrary to that statute, was not incapable of being re-elected into the same Parliament which expelled him, after he gave up his place: And upon that ground they have supported his re-election and sitting in the House as legal.

The force of the Case, however, reduces them to the necessity of maintaining, that the word *expel*, was improperly used in Mr. Woolaston's Case; because, as they say, he was only turned out of the House in order to carry an Act of Parliament into execution.

What the gentlemen therefore admit upon the Case of Mr. Woolaston, is sufficient for our argument. At the same time, we cannot help telling them, that their own argument upon that Case is very far from being just or accurate. For in all the expulsions in consequence of the Act of the 4th and 5th of W. and M. the House treated a Member's accepting or holding a place, contrary to the prohibition of that statute, as an *offence* which exposed him to censure, being, as the resolutions in the latter instances termed it, a *breach* of an Act of Parliament, for which offence they expelled the Member. And, indeed, it is impossible to say, that acting contrary to the Act, was not an offence in the proper sense of the word, because it was not only a breach of a prohibitory statute, but an attempt to elude a salutary Law, made on purpose to secure the purity and independence of the House of Commons.

Withal, as the Gentlemen themselves answered our question, when applied to the Case of King William and Queen Mary, in the negative, we do

do not see how they can give a different answer to the same question, when applied to a Case supposed under the Resolution of 1680. But it is no matter whether they do or not. For the Act of W. and M. is a prohibition upon the Members of Parliament, of the same nature and effect with the Resolution of 1680; and differs from it only in this circumstance, that the statute has no positive sanction at all annexed to it, whereas the Resolution has the sanction of expulsion annexed. And as the House of Commons treated the breach of that statute, as an offence meriting expulsion, although there was no express sanction to that purpose in the statute; it is clear, every expulsion in consequence of that statute, was of the same nature with an expulsion under the resolution of 1680: And therefore either both rendered incapable, or neither. And the Gentlemen say, Mr. Woolaston, who was expelled in consequence of the statute, was not incapacitated consequently, neither would one expelled under the sanction of the Resolution of 1680 have been disabled.

We would therefore recommend to the Gentlemen, to re-consider their own distinctions upon what they are pleased to call an improper use of the word *expel*, in the Case of Mr. Woolaston. For when they compare that Case with the sanction of expulsion annexed to the Resolution of 1680, they must, I think, see that the term was just as properly used in the one Case, as it could have been in the other; and not improperly in either. But when they compare it with the other Cases, which are in every respect the same with Mr. Woolaston's, and observe that in all of them, as in Mr. Woolaston's, the word *expel* was used, and the expulsion founded upon a Resolution implied or expressed, that the Member was guilty of a breach of the Act of Parliament, I cannot conceive what

ground they will find left to argue that the word *expel*, was an expression improper to have been used in the Case of Mr. Woolaston, more than in any of the other cases which occurred under the same statute.

For that reason indeed, we cannot perceive why the attempt has been made to treat or argue upon Mr. Woolaston's case, as a singular one, when it is but one of many in the precise same circumstances, and in which other Members were expelled for the same offence; the House of Commons having adjudged it to be an offence in them all, and not in one more than another, to be guilty of a breach of that Act. The only real distinction in Mr. Woolaston's case is, that after he gave up his place, he was re-elected and sat in Parliament; but that operates in this argument no otherwise than to prove, that every other one of the Members, expelled as he was for the same offence, and under the like circumstances, might have been re-elected, and sat in the same manner, notwithstanding their expulsion, if they had also given up their places. Which makes Mr. Woolaston's case, when confronted with the other cases of expulsion for the breach of the same statute, amount to an absolute demonstration, that capacity was not implied in expulsion, in the sense and understanding of that House of Commons which expelled Mr. Woolaston, and yet suffered him to sit upon a re election.

It also deserves to be remarked, that it was not 'till after the Act of the Queen, which declared the seat of any Member accepting an office void, and appointed a new writ to be issued, that the short method now practised in pursuance of that statute came into use. For before that, all the Members who accepted places contrary to the prohibition of the statute of the 4th and 5th of K. W. and Q. M. (which

M. (which was the first Law that created a disability by office, were formally expelled. And yet if the House of Commons had not considered the accepting of the office, contrary to the prohibition of the statute, or, *in breach of the Act*, as it is termed in the sentences of expulsion, to be an offence, and inflicted expulsion as a censure for the offence, they might then as well as now, have simply ordered a new writ to be issued in the room of a Member, who had accepted such a place as was incompatible with his continuing a Member, whereby his seat was necessarily become void.

But as they did consider the thing in the light of an *offence*, and therefore expelled the members acting in such offices, it necessarily follows, that all those expulsions, and Mr. Woolaston's among the rest, were as effectual incapacities, as any expulsion whatever, if the doctrine of our Authors prevail. But they have themselves excepted Mr. Woolaston's case, and therefore, with it, they must give up all the rest, as there is no difference between his case and the others under the same statute. And what is more, as Mr. Woolaston was re-elected, which fairly brought the question of *incapacity* into the field, his being allowed to sit, is a *judgment* of the House of Commons, that his expulsion inferred no incapacity; and consequently that no expulsion did: because, from what has been said, it is manifest his case was a common expulsion, and not an accidental, improper, or inaccurate use of the word *expel*, as the Gentlemen have argued.

I had rather use a convincing argument, than confident expressions, and therefore I shall not, after the example of the Writer of the *Considerations*, say what has been last offered is unanswerable and decisive. It is submitted to the judgment of the Reader. But I own I cannot reconcile together the grounds of the reasoning we have just concluded

concluded, and the doctrine contended for by our opponents, under either branch of the question. And I am persuaded I shall not be thought to have digressed from my subject, by introducing the consideration of the Resolution of 1680, as connected with the Act of W. and M. into this debate. I now shall accompany the Writer of the *Considerations* to the

Sixth and last class or description of men mentioned by him, and also taken notice of by the Author of the *Case*, viz. *Persons in execution at the time of their election*, who, it is said, have *stood disabled by Resolutions of the House of Commons, without an Act of Parliament*.

The shortest way to answer this Class, would be by denying the *fact*, that persons under this description *do* stand adjudged by the House of Commons to be incapable of being elected. I do not mean to say, the House of Commons never did so determine. But, as in the cases adjudged in that manner, they did not intend to make a Law of incapacity by their Resolution singly, but only to determine according to the law, as they conceived it to be; we have their own authority for it, that such determinations were erroneous, because the latest decisions contradict them. And this is but one more of the many instances to prove, that if we had no other notion of the Law of Parliament, but that talked of by these Gentlemen, that it consists of the decisions of the House of Commons, we should really have no such Law at all, if a Law means a fixed and binding Rule. We should only have a set of disjointed, inconsistent, and contradictory determinations, differing as the pragmatistical genius of the leading men in Parliament disagreed at different times. But it will be useful, and the manner in which both our Authors have treated this matter, makes it necessary to go a little deeper into it.

The Writer of the *Considerations* mentions the noted case of Sir Thomas Shirley, in 1604, in which, he says, "The question, as to the disability of persons in execution, was much agitated, but that the curious reading in those debates, is not exactly applicable to the present case, because the writ of execution, though it issued before, was not executed upon Sir Thomas 'till after his election." He farther informs us, That during the dependance of that case, a bill was brought into the House of Commons *for disabling Out-laws, Persons in Execution, and Recusants Convicted, from being of the Parliament*; which bill was rejected on the third reading, without one Yea. But the reason of the rejection, he tells us, was not "that the House of Commons then thought that persons under that description should be allowed to sit; but that they knew they were sufficiently secured from such a disgrace by the *Law of Parliament*, as it then stood; and *that they had a right to determine upon that Law*, and did not choose to submit their legal powers to be discussed and decided upon by the other two branches of the legislature:—"—"And that it was, and *continued to be* the Law of Parliament, *that persons actually in execution were not eligible*, appears (our Author says) from two cases, which happened a few years after." One is the case of Mr. Gifford, who was admitted to have privilege (17th Feb. 1625) because it was found, on examination, that he was not in execution 'till after his election. — The other is the case of Mr. Thomas Monk, who *having been in execution before and at the time of his election*, a new writ was ordered (24th Feb. 1625) to issue in his room, as of a *person incapable of being elected*.

The Author of the *Case* also cites the case of Sir Thomas Monk; and he mentions another in

1661,

1661, of the election for Leinster, in which it was adjudged, that the denying of the Poll to Mr. Coningsby, who was put in nomination, *did not avoid the election*, he having been a *prisoner in execution* for debt, and not eligible: And the other two Candidates were declared duly elected. This Author also, in a *note*, tells us, "The reason why a Person in execution is *not eligible*, is *obvious*, because such an one is notailable, consequently he cannot attend to discharge the duty of a Representative: whereas a person arrested on mesne process is admissible to bail."

I have thrown together the whole of what both the Gentlemen have said, in order preserve the unity of the answer thereto, and to make the application of it the more easy. And I do apprehend there cannot well be a more inaccurate state of facts, than that they have given us, or a more erroneous system of reasoning, than they have built upon it.

I am really ashamed to repeat what has been so often said, as to the fallacy that pervades the whole argument of these Gentlemen, and meets us again in the words now quoted, as it does in every paragraph when they talk of the *right of the House to determine upon the Law of Parliament*, as if that were any proof, that what is determined necessarily makes the Law of Parliament: Though nothing can be more certain than it is, that if the House of Commons were now to determine some things in a certain way, for example, that they have a share in the judicature of the last resort, or that now after two hundred years possession of the right of the eldest sons of English Peers, to be elected into the House of Commons, they have no such right: Such determinations, while they professed, as these Gentlemen speak, to *determine upon the Law of Parliament*, would be decisions against it,
and

and destructive of the constitution of Parliament as now modelled, beyond all doubt; and so in other instances which have been, and many more which might be mentioned.

But as to the class now before us, and the determinations concerning it, there is much matter for particular observations.

In the first place, two things are here confounded, in their own nature manifestly distinct. The question of *Disability* or *Capacity* to be elected, and the Privilege of Parliament when chosen. Supposing persons in execution were excluded from privilege, it would by no means follow in Law, nor is there any reason of the thing for it, that being in execution should be a disability to be elected, or should void the election of a sitting Member: For the person, though in execution to-day, may be discharged to-morrow on satisfying the debt, and be as much a freeman as any in the kingdom. Upon which principles it was held, even in the days when questions were made as to sickness and other things, about which there is now no question, that *Captivity* was no objection to an election. And so it was resolved (9th November 1605) "That Sir Henry Carye, a *Captive**, elected and returned, should not be removed, but stand still as a Burgeſs."

So in the case of Mr. Fitzherbert (35 Eliz.) who was arrested two hours after his election, and before his Indenture was returned to the Sheriff, as the Journals inform us, "There grew two questions, 1. Whether he was a Member. 2. Admitting he were, yet whether he ought to have privilege?" And "The judgment of the House was, that Mr. Fitzherbert was by his

* The Journal does not explain what sort of captivity was here meant.

“ election a member thereof, yet he ought not to
 “ have privilege in three respects. 1. Because
 “ he was taken in execution before the return of
 “ the Indenture of his Election, &c.”

There are Cases at this day excepted by special statute from Privilege. Certain debtors to the Crown have it not; and might in the excepted Cases not only be *in Execution*, but might be arrested on mesne process, if the *Personal Privilege*, (which by the means of artificial prorogations is now perpetual) were not saved, as I believe it generally is by those Acts of Parliament, which take away Privilege in particular Cases; but such a Case as that would not infer a Disability.

The reason therefore given by the Author of the *Case*, in his Note, why Persons in Execution are not eligible, and which, I presume, is his own, because I see no Authority cited for it, viz. That they are not bailable, is so far from being obvious, as he says, that it appears not only to be very insufficient; but, with all deference to him, is hardly intelligible. If not being bailable were a ground of Incapacity to be chosen, as he affirms, much more ought it to destroy Privilege, so as neither to stay the process of Execution, or to operate the discharge of a Member upon whom it is executed. Yet I do not find that the Author insists upon this as Parliamentary Law; and if he did, I am confident it would not be adopted by the House of Commons at this day. But if it were to have that effect, why should it work an immediate Incapacity, or Disability; seeing, as already observed, being in Execution, may not occasion an impossibility for one day to discharge the Duty of a Representative, which is the only reason the Author gives for it's being an Incapacity; and Sickness, or being an Ambassador, may lay a Member aside from his attendance,

attendance, or make him absent for years, and yet neither of these create an Incapacity.

Not attending, however, to this distinction between Disability and want of Privilege, or choosing to overlook it, the Writer of the *Considerations* refers us to the Case of Sir Thomas Shirley and Mr. Gifford, as Cases in which, as he says, the question of *Disability* was agitated. But there is not a word of such a question in either of these Cases. Sir Thomas Shirley's Case is moved, at the first, expressly as a matter of *Privilege*. The entry in the Journals (22 March, 1603,) is in these words, " This" (referring to an immediately preceding motion) " being a motion tending to "*matter of Privilege*, was seconded with *another* " by Mr. Serjeant Shirley, touching an Arrest " made—upon the Body of Sir Thomas Shirley, " &c.—and he prayed that the Body of the said " Sir Thomas might be freed according to the " known *Privilege of the House*."

In consequence of this motion, a writ of *Habeas Corpus* was immediately ordered, as it is expressed in the Journals *according to the ancient Privilege and Custom*. The whole enquiry and proceedings that afterwards ensued, which were the longest, and the strangest that ever occurred in any case of the kind, by the unaccountable warfare with the Warden of the Fleet, who would not obey the Orders of the House; the whole go to the point of Privilege, and to the mode of making it effectual under the particular circumstances of the Case: A question of Disability was never once glanced at.

After a full search into Precedents, and great consideration, the questions at last stated in the House (16th April 1604) were these three.
" 1. Whether Sir Thomas Shirley shall have Pri-
" vilege? 2. Whether presently, or to be defer-

“ red till farther order ? 3. Whether we shall be
 “ Petitioners to his Majesty, according to former
 “ Precedents, for some course of securing the
 “ debt, and saving harmless the Warden of the
 “ Fleet ? Which questions being severally put,
 “ were all resolved in the affirmative.”

In consequence of this, a Bill was actually brought in, and passed by both Houses, for securing the creditor's debt, and when, during the obstinate dispute with the Warden of the Fleet, a Petition was prepared to the King, to come and give the Royal Assent to the Bill, as it is entered in the Journals, “ it was not thought fit to
 “ proceed in that manner, being, as was conceived, some impeachment to the *privilege* of the House.” It appears they were determined, to assert and make effectual the Privilege of Parliament, by their own authority, in opposition to the old Precedents, of which there are many, of particular Acts of Parliament for delivering Members, and even the servants of Members from custody. Sir Thomas Shirley was at length brought out of the Fleet by the Serjeant with the Mace, and a second Bill was passed for indemnifying the Warden, the first having been found faulty ; And the persons concerned in making the arrest, were punished by the House for *breach of Privilege*.

From this detail the Reader will judge, whether it be true that the Writer of the *Considerations* says, “ that the Question of *Disability* was agitated in this Case ;—or if, as we set out with saying, it was simply a question of Privilege ; and for the faithfulness of the extract we refer to the Journals themselves.

The other Case of Mr. Gifford was a short one, but clearly also a question of *Privilege* only, and not of *Disability*. The first motion was, *that he might be sent for to attend his service in the House ?*

And

And the doubt, as to his being entitled to Privilege, arose upon the same ground on which Privilege had been denied to Mr Fitzherbert in the Case above referred to in 35th Eliz. viz. That he had been in execution before the return of his Election. But on examination, it appeared, that the Indenture was, by a mistake of the Returning Officer (who imagined it must be of the date of the next County Court,) dated after the Writ of Execution had been executed, but that the Election itself was on a day before, which ought therefore to have been the date of the Return. The Indenture of Return was ordered to be amended in it's date, and after the amendment was made, it was Resolved, " That Mr. Gifford *had Privilege*, " and to be delivered out of Execution," and a Writ of *Habeas Corpus* was accordingly ordered for that purpose. This is the other Case, in which the Writer of the *Considerations* says, the question of *Disability* was agitated.

These two Cases therefore, instead of proving (which is the purpose they are produced for,) that *being in Execution* was in those days held an incapacity to be Elected, only prove that *Privilege* and *Capacity* did not always go hand in hand, and that they ought to be distinguished: for proving which, we had no need to go so far back; for in the very Middlesex Election, we saw that there was an *Execution*, to which Privilege did not extend, yet nobody attempted to move for a new Writ upon account of the Execution as a *Disability*, even after the Record, on which the Execution proceeded, was called for, and was lying upon the table of the House of Commons.

But, secondly, the Writer of the *Considerations* seems exceedingly to have mistaken the tendency of his own argument to prove, that *being in Execution* was a *Disability* at the time of Sir Thomas Shirley's

Shirley's Case, when he informs us, that during the dependance of that Case, a Bill was brought into the House of Commons *for disabling Persons in Execution, Outlaws, and Recusants-convict, to be of the Parliament.* For that Bill, from the very title of it, could not be a *declaratory* Law, like the Bye Clause put into the Statute to enact penalties for preventing Minors being chosen, or pretending to sit in Parliament; and being a Bill to *disable* those persons, it, of itself, proves that they were not at that time under a *Disability*, and that it required an Act of Parliament to *disable* them; so that the Writer's *proof* only *disproves* his argument.

As to the reason the Writer of the *Considerations* gives out of his own head (for there is not a syllable of it in the Journals) why the Bill was *una voce* rejected, viz. "That the House knew they were sufficiently secured from the disgrace of such Members by the *Law of Parliament*;" being a reason spun out of his brain, as Spiders do cobwebs out of their bowels, it is just of such a flimsy contexture. The House, indeed, knew "that *Recusants-convict* were sufficiently disabled by the Statute of Elizabeth, of which we sometime ago put this Writer in mind, because it appeared he had forgot it. But the House knew, too, that *Outlawry* in civil Actions, and *being in Execution*, were no *Disabilities*.

They knew this from their own Journals, notwithstanding our Author's assertion. So much we learn from the famous Case of Sir Francis Goodwin, in which the great contest was between James the First, and the House, about their Jurisdiction; the account of which, fills up so great a part of the performance of the Author of the *Case*: For we see Outlawry was thrown out as one of the Objections against Sir Francis; and the Answer made to it is, "that notwithstanding

“ the two Outlawrys against Sir Francis, which
 “ were both in Queen Elizabeth’s Reign, (i. e.
 “ long before Sir Thomas Shirley’s Case) he had
 “ been *chosen, admitted, and served* as a Member
 “ of the House, in the several Parliaments holden
 “ 39th and 43d Elizabeth.”—And many Prece-
 dents were referred to on that occasion, not only
 of Members who were outlawed, and yet had been
 allowed to have Privilege*, but of Persons who
 had been chosen and admitted to serve, though
 under Outlawrys, particularly one Mr. John Kil-
 ligrew, who had fifty-two Outlawrys returned against
 him, and yet was admitted to serve in the House;
 and Sir William Harcourt, who was found to be
 eighteen times outlawed, and yet was admitted to
 serve.

These Cases are sufficient to show, that the rea-
 son assigned by the Writer of the *Considerations* for
 rejecting the Bill for disabling Outlaws, is not true.
 For from those Cases, the House could not but
 know, that they were not secure from the disgrace
 of Outlaws sitting by the Law of Parliament;
 and that the Law continued to be so after Sir Tho-
 mas Shirley’s Case, is proved by the Case of Fer-
 dinando Huddleston, Knight of the Shire for Cum-
 berland, in which it was resolved (28 May 1624)
 “ that his being outlawed ought not to prejudice
 “ his Election.”

The reason is equally false with regard to Per-
 sons in Execution; for the House must not only
 have known that the objection to them was not
 near so strong as against Persons outlawed; but
 they had further an express general Resolution of
 the House as far back as 1585, which we had oc-
 casion formerly to cite “ That Persons in Execu-
 “ tion, and those visited with Sickness should not
 “ be

* In the 1st, 23d, and 35th of Queen Elizabeth’s reign.

" be removed," which was tantamount to resolving that they were not incapable to be chosen, because if they had, they must also have been incapable to sit; but it is clearly proved by that old Resolution, that the House did not know (as the Writer of the *Considerations* says they did) that they were sufficiently secured by the Law of Parliament from the disgrace of Persons in Execution sitting in the House; because it proves that they not only did sit, but were secured in their seats by the Resolution*. And the Case of Mr. Fitzherbert above referred to in the 35th Eliz. still more directly proved by the question stated and decided in that Case, that the being in Execution did not disable to sit, or continue a Member of the House, though he was not allowed to have Privilege.

The fact therefore is, that the House knew when the Bill that was brought in during the dependance of Sir Thomas Shirley's Case was rejected, that the Law stood just the contrary of what the Writer of the *Considerations* has asserted the House then knew to be the Law of Parliament. The better reason therefore to be assigned for *dashing* the Bill, must have been, that they had no mind to alter the Law, especially by an occasional Bill, which tended to prejudicate a Case actually depending.

Thirdly, If it be evident from what has been said, as it certainly is, that it was not even what the Writer of the *Considerations* calls the *Law of Parliament*, at the time of Sir Thomas Shirley's Case, (which is the only one he cites before Mr. Gifford's, in 1605,) that persons *in Execution* were incapable

* This Resolution also proves, that the reason of the ineligibility of Persons in Execution, given by the Author of the *Case*, (that not beingailable, they are not able to discharge the Duty of a Representative,) is not a good reason, as indeed we have already shown it to be so very inadequate, that it only proves the Law is not so.

incapable of being chosen; it must also be pretty clear, that neither Mr. Gifford's Case, nor any other subsequent to Sir Thomas Shirley's, can prove that what *had not been* the Law, *continued*, as the Writer says it did, *to be* the Law. But the contrary of his assertion is also demonstrated by a direct authority. For in 12 Jac. Sir William Bampfield, who stood committed by the Lord Chancellor for a Contempt, (which is to all intents and purposes of the same effect as an Execution, and is notailable,) before his election, was not only allowed to be well chosen, but was allowed to have Privilege, and was delivered by order of the House.

Whatever, therefore, may have *appeared* to the Writer of the *Considerations*, we are persuaded it will not, after what has been observed upon Mr. Gifford's Case to any other person appear from thence, as our Author says it does, that the Law of Parliament either *then was*, or *continued to be* as he states, that persons in Execution were not eligible, as to which there was, as we have seen, in that Case, no question.

After such a subtraction from the Gentlemens Authorities, we must give them credit for the Case of Sir Thomas Monk, who was certainly deprived of his Seat. But upon what principles this was done we know not, for all that the Journals contain, is barely "that upon the information in the House, that Sir Thomas was in Execution before, and at the time of his Election, a Writ was ordered to issue for a new choice in his room."

It is also true, that the Case of Leinster, in 1661, stands as stated by the Author of the *Case*, that it was there adjudged that it did not void the Election, that the Poll had been denied to the

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Candidate who was in execution at the time thereof, and the other two Candidates were declared duly elected *.

As to the point in question in those cases, the determinations only prove the fluctuation of the decisions in the House of Commons ; but they are far from supporting the position of the Writer of the *Considerations*, that persons in execution, who, as we have seen, were not, before the case of Sir Thomas Monk, disabled by any Law, or by any resolution, but on the contrary, were held by many determinations to be capable of being elected, *do now stand disabled* by resolutions of the House of Commons : For the later determinations, as has been said, directly contradict the position.

Here we can by no means praise the candour of either of our Authors. The Writer of the *Considerations* stops at Sir Thomas Monks case, in 1625 ; and the Author of the *Case* comes no far-

* We cannot help however observing on this determination, that it justified a liberty taken by the Returning Officer, which the House has, on other occasions, severely animadverted upon. In 18 Jac. I. when the Sheriff took upon him to return Sir Thomas Bowman, knight of the shire for the county of Leicester, although Sir George Hastings had a majority of votes, on pretence that Sir George was incapable to be elected, by virtue of the old Statutes of Hen. V. and Hen. VI. as not being a Resiant in the county, the language in the House was, " the Sheriff is " judge of the number of voices, but not of ability or disability ; " *ergo*, his return naught." And the Sheriff and Under-sheriff were sent for as delinquents, and censured as *great Offenders to the House and the State*, although they had the pretence of an Act of Parliament to warrant what they had done. So tender was the House at that time of suffering objections of disability to be subject to the cognizance of a Returning Officer, under colour of his judicial quality being exercised so as to absorb his ministerial character, which is the chief part of the duty of a Returning Officer. There were, doubtless, reasons, why the Returning Officer, in the case of Leinster was justified, instead of being punished for a similar conduct, by the Restoration Parliament, where the influence of the court prevailed.

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ther down than the case of Leinster in 1661. Yet they both must have known, that there were later cases on the point in the Journals; and concealing them was only an unfair attempt to misguide those who do not read the Journals, which is a sort of conduct that cannot serve any cause. We shall state how the fact stands upon the Journals.

In the 2d of W. and M. 1689-90, Mr. Montague was chosen for the borough of Stockbridge when he was in execution; and 25th March, 1690, a petition was presented for him to the House, stating that fact, and stating "that *by Law*, and "notwithstanding such his execution, he was a "person *eligible* to serve in Parliament, and was so "elected." And therefore praying that his privilege of Parliament might be allowed.

On this occasion there was a full search by a Committee into all the cases, and a report made upon the 5th May, containing the whole precedents, down from the case of the Speaker Thorpe, who was executed in the reign of Henry VI. And it appeared there were two cases later than that of Leinster, in 1661, viz. Sir John Prettyman's, in 1675, and Sir Robert Holt's in 1676.

Sir John Prettyman was detained a prisoner in the King's-Bench on an execution, and he was, by order of the House, delivered out of the custody of the Marshal, to attend the service of the House. And it is clear from the proceedings, that the arrest was not a breach of privilege; for there is no notice taken of it as a breach of privilege, or any person complained of, or punished on that account.

In Sir Robert Holt's Case, it is expressly stated, that he was taken *in execution out of privilege*; and also that Sir Robert was under an outlawry. No question of *disability* is stirred; but on those grounds the Committee denied Sir Robert privilege, which was agreeable to antient precedents.

The House, however, upon the report, disagreed with the Committee, and it was *resolved*, " that " Sir Robert had the privilege of the House, and " that he should be delivered out of the custody " of the Warden of the Fleet." In these two Cases, therefore, the House went back to the old Law and the old determinations, before the Case of Sir Thomas Monk, and that of Leinster.

The Consideration of the report in Mr. Montague's Case, was put off several times, and I cannot find in the Journals that the House ever came to any determination upon it. But I see it stated in some other Books, that he was discharged of his imprisonment, and Bohun's debates are referred to, as an authority. Certain it is, Mr. Montague died Member of Parliament for Stockbridge, under the very election, by which he was chosen when *in execution*. For it appears from the Journals, that in the next Session of Parliament, upon the 26th, May 1691, above a year after the report upon his petition, that a new Writ was issued for the choice of a Member in his room, upon his *death*.

This may, for aught I know, be the last instance in the Journals in which the question occurred, except the Case of Mr. Asgill, in 1707, who was prisoner in execution, committed during the prorogation of the last English Parliament, before the first Meeting of the British House of Commons upon the Union taking effect. He applied to the House for privilege, and it was petitioned against by the creditors at whose suit he was in execution; and upon a report by a Committee which was appointed to search for precedents, it was resolved, that Mr. Asgill ought to have privilege, and he was delivered from custody, by sending the Serjeant at Arms with the Mace to bring him to the service

service of the House, from which he was soon after expelled for writing that strange book of his.

I now leave it to our Authors, who have carefully concealed these later Cases, to reconcile with them their position, that persons in execution, are at this day, ineligible by resolutions of the House of Commons. I believe the contrary is not so much as a matter of doubt, and that no returning Officer in the Kingdom would be found hardy enough, on that ground, to follow the example of the returning Officer in the Case of Leinster.

This finishes the list of Classes, given by the Writer of the *Considerations, of persons who are declared by resolutions of the House of Commons to be ineligible*. To those, he says, he "chooses to" "confine himself, though farther arguments" "might be drawn in confirmation of his doctrine," "if it was necessary, from the instances of the" "Attorney General, Persons outlawed and Recu-
fants-convict; and also, from the entries upon" "a question, Whether the Heirs apparent of Peers" "might continue to sit, as to whom the House" "of Commons, without asking for an Act of" "Parliament, determined the *Law to be* that" "they *might*." He farther acquaints us, that, "to these, six heads of disability, he confines" "himself, because with respect to these, the ar-
gument, to him, appears clear, decisive and" "unanswerable."

The argument of this Writer may very possibly, to many beside himself, appear clear, decisive and unanswerable. But to me, if I can at all understand it, it is so clearly fallacious in the very construction of it, and so fully answered by the very proofs he has brought in support of it, that I imagine I shall not be singular in thinking it would have been very *necessary* for him (notwithstanding the dispensation he has taken to himself,) to have brought

brought *farther arguments*, and better ones too, if he could have found any other case that furnished them.

What has been said will, I believe, satisfy a reasonable Reader, that the Cases of Outlaws and Recusants-convict, of neither of which he seems to have known *too much*, were not a quarter from which he could have drawn auxiliary arguments.

The Case of the Attorney General, which the Writer of the *Considerations* declines to argue from, I will mention, that it may add all the weight it can to his Classes : For I think it is the likeliest to a disability, by a *mere resolution* of the House of Commons, of any I have met with. And so Lord Coke expresses it, "*by special order*," (says he) "of the House of Commons, the Attorney General is not eligible to be a Member of the House of Commons." But at the same time, to do justice to this Case and to the *Law of Parliament*, as now clearly understood and settled, that the Attorney General is capable of sitting in the House of Commons, it is fit to understand how the *Special Order* which excluded him happened to be made, and what effect it had : Which will somewhat elucidate the notions these gentlemen would give us as to the Law of Parliament.

The question as to the Attorney General, was first stirred in Parliament, 4to Jac. before which time, as appears from the Journals, the Attorney General had always been in the House of Lords as one of the Attendants called by Writ. The question arose upon occasion of Sir Henry Hubbard, a Member of that Parliament, having been appointed Attorney General when Parliament was not sitting. Sir Henry Hubbard is one of those mentioned in the Note referred to by the Author of the *Case*, page 30, which, at the opening of the Session, (19th, November 1606) "the Speaker produced

" duced assent to him by commandment from the
 " Lord Chancellor, containing the names of cer-
 " tain Members of the House, disposed and em-
 " ployed by his Majesty, since the last Session, in
 " special Services; with direction to know the
 " pleasure of the House, whether the same Mem-
 " bers were to be continued, or their places sup-
 " plied with others."

All the Cases having been referred to the Com-
 mittee of privileges, their Report (22d Novem-
 ber) is in these words, " Touching Sir Henry
 " Hubbard advanced by his Majesty to the place
 " of Attorney General, it was remembered that
 " in 8vo Eliz. Mr. Onslow, Solicitor, being
 " called by Writ into the higher House, was
 " afterwards chosen Speaker by this House: Mr.
 " Jefferies also, the Queen's Serjeant, was de-
 " manded by this House to do Service here. Ma-
 " ny precedents of the King's Serjeant and Sollici-
 " tor; none for the Attorney, *sed eadem ratio.*"

The proceedings in the House are entered in
 the Journal as follows.

" Touching Mr. Attorney, it was much dispu-
 " ted what should be the question; at last the
 " question agreed and so made."

" Q. Whether he should be recalled, *admitting*
 " *that he was already called by Writ of Attendance*
 " *into the Higher House, as the House conceived he*
 " *was.*"

" Upon this Question, the House was not sa-
 " tisfied, but would have it made, whether a new
 " choice."

" The House upon this grew to division, and
 " by division to confusion, for they were not num-
 " bered, nor one part well understanding ano-
 " ther, they settled again, and made a new Que-
 " tion, viz.

" Q. Whether a question should be made of
 " it

“ it; and by voice over-ruled that no question should be made of it, but the matter should rest, and so was understood and left at that time.”

The next day the House met, the following is the first entry in the Journal. “ Mr. Attorney came in of himself, and continued by *connivance* without farther order.”

This is the first chapter of the *Law of Parliament* as to the Attorney General: A Law made by the *confusion* of a House of Commons; by a *division* that could not be numbered, one part of the House not understanding another; by a *determination* that no question should be made; and lastly by the Attorney General's coming in of *himself*, and sitting by *connivance*.

From this strange story, all that I can collect is, that as the Attorney General had usually been called by Writ into the House of Lords, as one of the Attendance of that House, this Circumstance was the only tangible objection to his sitting in the House of Commons, and the only thing which distinguished his Case from that of any other Servant of the Crown: the House conceiving, (as it said) that Sir Henry Hubbard their Member, who had been appointed to the Office of Attorney General in the interval of the Sessions, *was already called by Writ of Attendance* into the higher House.

The Question seems to have taken its rise from the proceedings on former Occasions, with regard to the Solicitor General and King's Serjeant, as to whom the Fact, as upon the Journals was this: That in two instances, viz. those of Mr. Onslow, in 8vo Eliz. and Mr. Popham in 23 Eliz. they being Members of the House of Commons, when appointed Solicitors, were re-demanded from the Lords, notwithstanding the Writ of Attendance calling them in to the Upper House, and were both

both restored, as it is expressly said in the two different Cases, *because the House of Commons had the first possession of them*; and both these Gentlemen are chosen Speakers, upon their return from the House of Lords.

As to the Crown Serjeant, the case of Mr. Geoffrey occur'd in 18 Eliz. (6th Feb. 1575) in which it was "Concluded that, according to old precedents, he *might* have voice as a member of the House, notwithstanding his attendance in the Higher House as one of the Queen's Serjeants, where he had no voice.*"

Sir

* The case of Mr. Onslow, referred to in the above report, was this: Mr. Onslow being a Member of the Lower House, was, upon a prorogation of the Parliament, made Solicitor-General; and when the Parliament met again, immediately after the Queen's commission was read in the House of Lords, intimating her Majesty's licence to proceed to the election of a Speaker, "It was moved" (as the entry stands in the Journal) by Mr. Comptroller for the Commons, "That, for that Mr. Onslow, Solicitor-General, was a Member of the Lower House, he might be restored to join in their election, and upon consultation had among the Lords, Mr. Onslow was sent down with the Queen's Serjeant and Mr. Attorney General, to show for himself why he should not be a member of this House, who alledging many weighty reasons, as well for his office of Solicitor, as for his Writ of Attendance in the Upper House, was nevertheless adjudged to be a Member of this House." The election of Speaker having then proceeded, Mr. Onslow was chosen.

The other instance of the like sort referred to in 23 Eliz. in the case of Mr. Popham, was thus, as entered in the Journals. There being a vacancy of the Chair, when the Commons were about to proceed to the election of a Speaker, Mr. Treasurer declared to the House, that he and others had seen a Member of their House, in the Higher House, when the House had been there to receive the Queen's answer of licence to choose a Speaker, and the House, before proceeding to the election, sent messengers to the Lords to demand the restitution of Mr. Popham, Solicitor-General, and Citizen for Bristol. They received for answer from the Lords, "That their Lordships had resolved he should be sent down, the rather because he

Sir Henry Hubbard the Attorney-General having sat by connivance, in the manner above mentioned, in the Parliament 4to Jac. the question was again brought into debate in the Parliament 12mo Jac. and it seems then to have been made a party question with the Court. For the House, losing sight of all principles, did not even pretend to go upon the only ground pointed out by the debate in the former Parliament, and by the precedents then referred to as to the Solicitor-General, namely, the Attorney-General's being an attendant of the House of Lords, called thither by Writ : but they strayed into objections taken from his office and situation as a Servant of the Crown ;

“ was a Member of this House, and this House possessed of him before he was Solicitor, or had any place of attendance in the Higher House”—And Mr. Popham being restored accordingly, he was chosen Speaker.

There is another case related from D'Ewe's Journal, in the Parliament of 28 Eliz. (of which there are no Journals printed) of Mr. Egerton, Solicitor General, who was chosen Burgess for Reading, after he had been commanded by writ to attend in the Upper House, and had attended there three days. The Commons demanded, that he might be dismissed from farther attendance there, and come into their House. But upon consultation, and defence made by himself, the Lords retained him ; and the main reason is mentioned to have been, because they were first possessed of him.

The Resolution as to the *Serjeant*, in 18 Eliz. (16 Febr. 1575) is in these words—“ On sundry motions had, it is concluded by this House, that according unto the old precedents of this House, Mr. Serjeant Geoffrey being one of the Knights returned for Suffex, *many have voice or give his attendance* in this House as a Member of the same, notwithstanding his attendance in the Higher House as one of the Queen's Serjeants for his council there, as the place where he hath no voice, indeed nor is any Member of the same.”

These Cases illustrate what was said in a former part, as to the distinction between *Compatibility of Situation*, and *Capacity of State*. To show that there may be an incompatibility from situation of sitting in the House of Commons, when there is no *incapacity* in the proper sense to be elected.

although

although in that respect the Attorney-General stood upon the same footing as the King's other Servants, particularly with the Solicitor-General, whose office was, in the debate, not improperly called a limb of the Attorney-General's: They talk'd of there being no precedent for the choice of an Attorney, as if it required a precedent for any man to be chosen of *common right*, when under no legal disability: They spoke of Privy Councillors not having antiently been chosen, though it was admitted, they had then got such a continuance, that they must remain: And after ranging over such wild ground as that, "Perplexed (as some of the Members expressed themselves) in respect of the consequence, in respect of the privileges of the House, and satisfaction of his Majesty;" they came at last to a strange, illegal, and unparliamentary compromise, rather than a determination, "*resolving*, that the Attorney-General should, for that Parliament, remain of the House." And "That no Attorney-General should, after that Parliament, serve as a Member of the House."

Such a determination, if it can be called one, was the child of mere caprice. For if the Attorney-General was really incapable of being elected or sitting, the House had no more right to retain him for *that* Parliament, than they had to call into the House any person who was not chosen a Member: And if he was not disabled, they had no right to resolve, that he should be excluded from any Parliament. Such an attempt to mutilate the House, is well censured in the firm expression of a Member in one of the debates upon the subject, who said, "he would rather part with a joint of his hand, than lose any part of that politick body whereof he was a member." But to pretend to exclude him from a future Parliament, was only

weightning the absurdity of the proceeding, as it has not, at any rate, in their power to bind a future House of Commons by any such resolution.

Thus, however, the business ended at that time; and in the Parliament 18 Jac. it was reported from the Committee of Elections as follows; (7th Feb. 1620) "for the Attorney-General, now in the Lords House, *because by his Majesty's allowance,* an order last meeting against any Attorney-General being after of this House, thought fit a new writ." And upon this report, it was in the House resolved, (8th Feb.) "that the order the last meeting in Parliament, concerning the not serving the Attorney-General in this House shall stand." Then is added—"A new writ.

In the next reign, when the first Parliament of Charles I. met, there is the following entry, (9th Feb. 1625) "Mr. Speaker moveth, that Mr. Attorney-General, returned for Grimsteed, and mentioneth the order, 12th Jac.

"The order to be brought and read to-morrow morning, and then ordered to be taken forward in the House."

And 10th Feb. there is this short entry—"A new writ for choice of another burgefs for the borough of East-Ginstead, in the room of Sir Robert Heath, his Majesty's Attorney-General, according to the precedent of 12th Jac."

The very reason for which the Writer of the *Considerations* gave a *Go-bye* to this case of the Attorney-General, at the instant he was inlisting it into his service in the dark, made it proper for us to state it fully: And it is no wonder he chose to avoid the particulars of the case, as it is so very notable a sample of the *Law of Parliament*, in his notion of it, that the case furnishes.

Every body knows, that notwithstanding the Resolution-incapacity laid upon the Attorney-General,

neral, or the *special order* by which that *office* was excluded the House of Commons *in futuro*, at the very same time the *person* who held it, was allowed to sit *de presenti*, it is now, and has for a century past been the Law of Parliament, now confirmed by constant possession, and become part of the constitution of the House of Commons, that the Attorney-General may sit in it. And the importance of having that great officer of the crown there, which was probably never more felt than in Charles the 1st's Parliament, which turned him out, in compliance with the special order of 12 Jac. is now so well understood, that we hear no more of a writ of attendance to call him into the Upper House, nor has any question been made as to his eligibility, since the Restoration.

With regard to the case of heirs apparent of Peers, which is also mentioned in a *side-way*, by the Writer of the *Considerations*, it was no wonder, that a question was made of it, when the first instance occurred, upon the occasion of a younger son of a noble family, then a Member of the House of Commons, becoming, by the death of his elder brother, the heir apparent of the peerage, as before that time, no eldest son of a Peer had been chosen a Member of Parliament; which, if not a tacit Law of incapacity, was at least a reasonable ground of doubt. But the question having been once determined, in the case of a son of the House of Bedford, and the determination not many years after repeated upon a like instance occurring in the same family, under the very same circumstances, there it rested; and by a constant positive possession for above 200 years, it has become the undoubted Law of Parliament, that the eldest son of a Peer of England, may be of the House of Commons.

The

The determination at the first, was not without it's legal ground, however good reason there was to doubt from the non use of the right, which very naturally created a presumption of Law against it; for it has been held by the Lawyers, that " whosoever is not a Lord of Parliament, and of " the Lords House, is of the House of Commons, " either by person or by representation, partly co- " *augmentative*, and partly representative." That doctrine was recognized in the debate upon the question as to the Attorney-General, in which it was affirmed, that every man is either in the House of Lords, or in the House of Commons.

The Author of the *Case* has added to the list of his Friend, the Writer of the *Considerations*, the *Judges*, as a class of persons *not eligible* by *Resolutions* of the House of Commons. But he might almost as well have mentioned *Bishops*. For no body is ignorant, that it is of the very Being and Constitution of Parliament, and consequently, that it is part of the most fundamental Law of Parliament, that the Twelve Judges of England sit in the Upper House, as *Assistants* to the Lords in their judicature, all writs of error being to be tried in the Higher House of Parliament. And the Judges are not like the Attorney and Solicitor-General, and the Serjeants and other *Attendants*, who *may* be called by writ to attend, but may be dispensed with. The Judges *must* have their writ, and must be in the House of Lords, where they necessarily have their places on the wool sacks, to give their opinion in matters of Law, when called upon, and to examine petitions and prepare bills, as much as the Lord Chancellor or Lord Keeper of the Great Seal must be there to assist as Speaker of the House, though he should happen not to be a Peer.

But it is only the twelve Judges of the courts in Westminster-Hall, that have places in the House
of

of Lords; and therefore all other Judges of the courts of Civil Law, and the Chancellor of the Dutchy, who by office do not belong to the House of Lords, may be, and usually are, in the House of Commons. And since the union, it required a special Act of Parliament to incapacitate the Judges of the supreme courts in Scotland, to be elected Members of the House of Commons, because they were not officially, or by writ called to attend as assistants in the House of Lords, and had no place there.

The Author of the *Case* therefore might, with equal reason, have produced from the Journals, an order for a new writ, in room of one called up to the Higher House as a Peer, to prove that Peers cannot sit in the House of Commons, as he cites orders of the like sort, as to persons appointed Judges, to prove that they are *not eligible only by Resolutions* of the House of Commons.

The Author of the *Case*, however, totally mistakes the real meaning of the two entries he extracts from the Journals, as to judges, the first of which he does not cite fully, and consequently not fairly. 28th June, 1604, Sir Edward Hobbes bolts out a doubt to be resolved——“Whether if a *Member of this House* be called to the place of a Judge, or other Attendance above *during the time of Parliament*, he ought to *have Place in the Higher House*,” or, (which words our Author omits) “sit here during the same Parliament.” The meaning of which, as I conceive, was not, whether it was compatible for one of the Judges to sit in the House of Commons, but whether the House could *return* a Member they were in actual possession of, and keep him from being called up by writ to assist as a Judge in the other House, the very same question, which was, in some degree, tried with regard to Members of the House of Com-
mons

mons appointed to the office of Solicitor-General; in the instances which have been mentioned, when the person being antecedently a Member, was reclaimed from the Lords by the Commons.

So in the entry from the Journals, cited by the Author of the Case, of two Members, one appointed Chief Baron, and the other a King's Serjeant, the question stated was expressly—" If " the House should *reca*l their own Members?" and it was resolved in the negative. The reason was very obvious; for though a Solicitor-General, whose office did not necessarily make him an *Attendant*, and did not at all make him an *Assistant* in the House of Lords, might be re-demanded, when the House of Commons was first in possession of him, the House of Commons could not require a Member who was appointed a Judge, to be restored, no more than they could demand back a Commoner created a Peer. The office of a Judge necessarily constituting a relation to the House of Lords

In the very Entry in the Journal referred to on this occasion, the distinction was taken notice of, for the words of the Report of the Committee are, " Serjeant Snigg, Lord Chief Baron, attendants as *Judges* in the Higher House, not to " serve here—if a Serjeant to serve here." And the old Resolution above quoted as to Serjeant Geoffrey in 18 Eliz. seems to have been calculated to preserve an option in the House of Commons, to admit or exclude from their House these lower attendants of the House of Lords, who might, or might not be there, and who, by their office, were not to give even an opinion in matters of Law in that House. It is clearly therefore a mere misunderstanding of the Journals, and a forgetting of the very Constitution of the House of Lords, which has led the Author of the *Case* to rank

rank Judges in *general* too, as if he meant *all* Judges, in his imaginary classes of persons, not eligible by Resolutions of the House of Commons.

Another additional class, reckoned up by the Author of the *Case*, and also barely mentioned by the Writer of the *Considerations* among his *Super-numeraries*, are the eldest sons of Scotch Peers. But the Gentlemen are also equally unfortunate, in this authority for their doctrine. For not merely to say, which would be enough, that the determination of the British House of Commons, by which the eldest Sons of the Peers of Scotland were adjudged to be incapable of sitting in the House of Commons, expressly makes the *Law of the Land* the ground and foundation of the decision, and the sole one : I say, besides this, it happens really to be an incapacity by statute, and a statute of the most solemn kind, being in consequence of an Article of the Union.

The words of the Motion and Question put upon this subject were, “ That the eldest sons of the
“ Peers of Scotland *were* capable by the *Laws of*
“ Scotland, at the time of the Union, to *elect* or *be*
“ *elected*, as Commissioners for Shires or Boroughs
“ to the *Parliament of Scotland* ; and *therefore* are
“ capable to elect or be elected to represent any
“ Shire or Borough in Scotland, to sit in the House
“ of Commons of Great-Britain.”——It passed in the Negative.

Now it will not be disputed but the Laws of Scotland, at the time of the Union, were the *Law of the Land*, in this matter, as to that part of the united kingdom : And these were Laws which the Act for the Union had confirmed, and indeed, made unalterable. For by an article of the Union, it is expressly declared, (and upon that the Negative to the above motion was founded) “ That none
“ shall be capable of *electing*, or of being *elected*
D d for

“ for Scotland to the Parliament of Great-Britain,
 “ but such as by the Laws of Scotland, at that
 “ time were capable.”

It is to be observed, that the incapacity goes to *electing*, as well as being *elected*, which of itself takes it totally out of the Line of these Gentlemens doctrine as to disability. But another thing does it no less, and that is, that the incapacity is confined to the representation of Scotland: For which reason, eldest Sons of Scotch Peers do now sit in the House of Commons when chosen in England, and always have done since the Union. So that they are by no means under an incapacity, or ineligible in our Author's sense of the word.

The Author of the *Case* descends to individuals as not eligible by Resolution of the House of Commons; meaning, we suppose, to give an instance in proof of his position, that the House have “ adjudged Persons incapable of being elected from “ the *particular circumstances of the Case, and upon* “ *general principles of constitutional policy.*” He quotes the Case of Mr. Montague, against whom, upon proof of Bribery, in one of his Elections for Stockbridge, (not when he was chosen when in execution) it was resolved that it was a void Election, and “ that Mr. Montague be disabled from “ being elected a Burgess to serve in this *present* “ Parliament for the *Borough of Stockbridge.*”

This, however, is an instance full as little to our Author's purpose as any of the others. For the inelegibility is confined to his representing the Borough of Stockbridge in that Parliament, for procuring his being elected into which he had there practised the bribery. The Resolution therefore is no more than determining that bribery should not be allowed to have its effect: And if this is not a legal determination, and as strictly conformable to, and founded on the *Law the Land*,

as fifty Acts of Parliament could make it to be,
Jus publicum vanum est.

I imagine no Law in the world can be so absurd as to secure a convicted Thief in the possession of the stolen goods: and from that, it does not differ one *iota* in Law, Sense, Reason or Justice, if the House of Commons, after declaring an Election void for bribery, could not hinder the corruptor from reaping the fruits of the *same* bribery at the new Election, necessarily to follow upon the adjudication declaring the former void. I apprehend the Resolution against Mr. Montague, is in the strictest sense a judicial sentence founded in Law, and, by necessary implication of Law, springing out of the nature of the Case, as much as *intestibility* necessary follows a conviction of perjury, or a judgment that a Knight of the Post shall not be received as a witness, which any Court of Law not only may, but must decree to be according to Law.

Our Author, however, to have been perfectly fair, should, when he quoted this disabling Resolution, as he would call it, also have told us, that it was warranted by repeated general Resolutions of the House of Commons, to be found in the Journals from the 29 Charles II. when it was first “ resolved, and ordered to be an instruction to the Committee of Elections, and to be from time to time entered amongst the standing powers given by the House of Commons to the said Committee, that certain male practices which are thereby declared to be bribery, should be a sufficient ground for making an Election void, as to the Person offending, and to *render him incapable to sit in Parliament* by such Election.” Such a resolution, I apprehend, was perfectly within the powers of the House of Commons, and of sufficient authority to bind all *Cases* within it, not only as a fit and

legal order of judicial proceeding, but as a just and necessary Regulation for preserving the purity and freedom of Elections, which by the Constitution are the peculiar Charge of the House of Commons, as immediately affecting itself, and indispensable for effecting the ends of justice in all determinations thereupon. And to give the Resolution perpetual force, independent of the will or inclinations of any House of Commons, it was after enacted by the clause in the Statute of the 7th King William to the same effect, before mentioned.

The only other *Resolutions* mentioned by the Author of the *Case*, are such as give effect to, and merely are executive of particular statutes by which disabilities are introduced and expressly enacted. I know not with what view he swelled his Catalogue with them. Neither do I understand the reason of his citing the Orders in 1606, for new Writs in room of the Members appointed Treasurer at War in Ireland, and Chief Baron there, whose names were contained in the note before mentioned, sent from the Chancellor to the Speaker, of Persons disposed of by his Majesty in special Services, as to whom he desired to know the pleasure of the House, whether Writs were to be issued for Elections in their stead.

These Cases have nothing to do with the present Question; they bear no relation to disability or incapacity to be chosen, the orders for new Writs were issued in those Cases in the ordinary course of the proceedings of the House, for preserving the representation of the People full, upon the just principle mentioned and maintained in the House in those days, perhaps with more care than in later times, that the *End of Parliaments was to have those present that did represent*. Not seeing, therefore, of what influence such sort of Cases are upon the present
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sent Argument, it would be but fruitless to pursue them with any particular observations.

Thus have I travelled with both our Authors through all their *Classes* and *Cases*, and I persuade myself, it will not appear, that there is among them all, one Resolution of the House of Commons *standing in force at this day*, (not even the *Special Order* as to the Attorney General excepted,) *disabling* any man from sitting in Parliament, or of effect to incapacitate or render ineligible any person or order of men *against the Law of the Land*, or in *contradiction to the Common Right of the Subject*.

After all, I must, resume the real Question, and return to this, which, as was premised, I conceive to be the only true state of the Argument; That whether the determinations of the House of Commons with regard to any of these Classes, or at any one time or another have or have not been agreeable to Law, still the Cases do nothing less than prove it to be the *Law of Parliament*, that the House of Commons has a right or power by its own Resolution *singly*, to *incapacitate, disable* or render *ineligible*, either Individuals, or Classes of Men. For all the Cases are mere determinations of the House in the exercise of its judicature as to Elections and Returns: And that is as different from *making Disabilities by Resolutions*, as the House of Lords determining a Cause upon a Writ of Error or Appeal, would be different from their reasolving this or that to be Law, by virtue of their own judicial authority only.

In that Case, the House of Lords, and in the other, the House of Commons, would act a *legislative* instead of a *judicial* part, which is beyond their power: And their Resolutions would not be *legal determinations*, but usurpations of Legislature, which belongs to the united power of King, Lords
and

and Commons. It would be an *Ordinance* instead of an *Act of Parliament*. The doctrine is dangerous and detestable. It tends to dethrone Justice, and to establish Tyranny in her Seat. If it does not storm, it is a treacherous surrender of the very Citadel of Liberty.—To maintain such doctrine, is to invest the House of Commons with a power destructive of the Constitution, repugnant to the Law of Parliament, and that overthrows the Rights of the People.

I cannot, however, express myself with more force than the Commons of England in Parliament assembled, have, to the immortal honour of the House of Commons, done upon the very point. I shall therefore take the liberty to finish this long head with the words of the Representatives of the People of England in the famous conferences in 1689 with the Lords, upon the Amendments proposed by their Lordships to the Bill for reversing the cruel, arbitrary and illegal judgments of the Court of King's Bench, against Titus Oates, which had been affirmed by a decree of the House of Lords.

The Commons told the Lords, “ That by taking upon them to affirm such judgments as these, which the Lords themselves agreed to be erroneous, they had, in a manner, taken the Law into their hands.”

“ That this *arbitrary* power in the Lords *judicature* was a *new discovery*, and, if it had been understood in former times would have been un- a very expeditious way of *altering the Law* upon several occasions.”

That “ the Lords as a *Court of Judicature* were as strictly tied to give judgment according to Law, as any inferior Court whatsoever.” That “ They must not proceed upon *Considerations* of convenience : But *that* judgment of the Lords was agreed

“greed to be given, not according to Law but
 “according to an opinion which their Lordships
 “had conceived of the party :—instead of cor-
 “recting the acknowledged errors of the Judg-
 “ments in the King’s Bench, they affirm them;
 “and so *change the Law*, which ought to be the
 “*certain and steady Rule of Government*, into the
 “ARBITRARY RESOLUTIONS of that House.—”

“That the Lords—did seem to have inverted
 “the several methods of proceedings in their dis-
 “tinct capacities.”

“In their *judicature*, where they ought to act by
 “*the strict Rules of Law*, they proceed according
 “to a supposed convenience in their *legislative* ca-
 “pacity, where there is a latitude of proceeding
 “according to a moral certainty and convenience,
 “a single expression—though inserted upon just
 “grounds will not be allowed.”

In a second conference the Commons thus ex-
 pressed themselves,

— “For your Lordships to *assume a discreti-*
 “*onary power* to affirm a judgment, though at the
 “same time you agree it to be erroneous, is to
 “*assume a power to make Law*, instead of *judging*
 “*according to the Rules of Law*.”

“It is recorded” (said the Commons) “to
 “the honour of your noble Ancestors, that they
 “declared they would not change the Laws: And
 “the Commons hope you will pursue their steps,
 “and not, by affirming erroneous judgments, go
 “about to *make that Law which was not so before*;
 “and by insisting upon collateral terms, before
 “you will reverse those judgments in the legisla-
 “tive way, *take to yourselves*, in effect, the *whole*
 “*power of the legislature*: which is not only to
 “*change the Law*, but to *subvert the CONSTITU-*
 “*TION OF THE GOVERNMENT*.”—

Such was the doctrine of the REVOLUTION
 HOUSE

HOUSE OF COMMONS, in support of the LAWS OF ENGLAND, and the RIGHTS OF THE PEOPLE OF ENGLAND. If I could but catch a spark of the fire of this Remonstrance, I should, with some spirit, finish these reflections, when, to compleat the plan I proposed, I am now come to the

Vith. And last general Head, which I promised to bestow upon shewing, yet further, the real importance of the Question which has been treated, by pointing out the danger of the Propositions, which I hope have, in the Argument, been proved to be erroneous. And

First, in the *penal* incapacity, by *implication* arising from expulsion, there is this specific danger, that it must, from the very nature of the thing, be liable to be made an occasional Engine of Tyranny to proscribe particular Members of Parliament, and garble a House of Commons.

Such was the use of expulsion and disability in the Parliament of 1640. That the expulsion of Sir Robert Walpole, with the incapacity adjudged against him, was used for this purpose, no Whig can deny. This circumstance alone merited very serious consideration before such a solitary authority, such a malignant sentence, had been used as a precedent, or pursued as an example. The friends of the House of Hanover usually look back to the proceedings of Queen Anne's Tory Parliament, only to remember the great deliverance wrought by providence for this Country, in frustrating the counsels of those Men, whose machinations centered in the defeat of the Protestant Succession, and restoring the Pretender.

This danger cannot exist, if the Law of the Land is the certain and steady rule of incapacity, unless with such a House of Commons as can venture to set the Law at defiance, and laugh at the Constitution itself. But so long as expulsions them-

themselves are arbitrary, an incapacity implied in them, must be so too. And nothing is more arbitrary than expulsion, because there is no Law or rule defining or limiting the causes of it.

Such a sort of incapacity can never be the instrument of equal and indifferent justice, and therefore must be an evil of a most pernicious tendency, most repugnant to the Spirit of a Free Government, and adverse to the genius of this constitution. It is the glory of it, that men know the Law by which they are to be judged; that by the Law only the guilty are punished, as well as the innocent protected: And that in every situation, justice is administered by the golden and straight mete-wand of the Law, as Lord Coke calls it, and does not bend to the uncertain and crooked cord of discretion.

This implied incapacity is absolutely a *præmunire* without statute and without judgment, which puts every Member of Parliament out of the protection of the Law for the noblest privilege, and deprives the Electors of England of their highest Franchise. For these are made to depend upon the mere pleasure of a Majority of the House of Commons, which may be their caprice, their malice, party heat, opposition of opinion and objects:—And with all these, has at some times been a design to subvert the constitution.

It is the brilliancy of civil policy, and the lustre of a well tempered constitution, that there is a wise mixture of mutual checks to prevent the evils to which the subjects are exposed, where every thing is resolved into the mere will of Governors. In England the Judge checks the Jury, the Jury controuls the Judge, and the Law rules both. In that Judicature by which expulsion is inflicted, there is no check at all, if incapacity is annexed to it; which is rather laying the reins upon the neck

of Power in too dangerous a manner. If Expulsion is left without Incapacity, the power of Re-election is a check, because an excess in the Judicature would prove fruitless, if it was foolish or wicked; and the Member who did not deserve to be expelled, return in triumph over Partiality and Precipitance.

There is at least a shadow of safety against Incapacity by Resolutions disabling classes of Men, because of the number they affect; as whole bodies cannot well be the objects of malicious Resentment, or suffer for the sake of one that is. But a disabling Expulsion that can take one, and leave another, and do execution just as it is levelled, is capable of being converted into a downright *Ostracism*, and may lay waste by piece-meal, till it effect a total desolation of Virtue and Patriotism, as it did in the House of Commons of 1640.

Nothing can better show this danger than the Expulsions of that Parliament, which proceeded from the spirit and party of the times.

Sir Edward Deering, we have seen, was expelled for publishing Speeches in favour of the Constitution.

Mr. Holles was expelled for making a Speech, of which it is mentioned, that it was with great strength of reason and courage, but more heat than the times could bear. He was afterwards, indeed, restored by the favour of the House; but the Restitution, which was as illegal, as the Expulsion was outrageous, only illuminates the danger of unbridled Power in critical seasons.

Mr. Taylor was expelled upon the evidence of a Paper, containing words alledged to have been spoken by him at Windsor, as to the Bill against Lord Strafford, and he was imprisoned till he should make a public Recantation at Windsor. This,
and

and Sir Edward Deering's Case, are both among the Gentlemen's Precedents.

A Member was suspended for a Session for some words, which, it is said, gave offence; that is, which the Majority did not like to hear.

Two Members were sent to the Tower for bringing in Candles against the desire of the House, when, very probably, their Proceedings suited the darkness. For the same, or for a less Offence, they might have been expelled, consequently incapacitated, if that be the Law of Expulsion.

Nor is it to the Parliament of 1640, that such Expulsions were peculiar.

In the 18th of James the First, a Member was expelled, because he said something on a Bill, which (it is said) *seemed* to reflect on the person who presented it, as favouring of a Puritan and factious Spirit, and he was told his judgment was very merciful, for that the House might, for so exorbitant an Offence, have imprisoned and farther punished him.

But, to cut the matter short, I would ask but one Question. Can any man be found bold enough to stand up in his Place, fortified with all the Precedents which have been collected, and with the doctrine by which they have been supported, and move for a Bill, that every Person expelled shall be incapable of being re-elected into the same Parliament? I don't believe one will be found. Yet if it ought to be Law, why not enact it? *Si quis legem sanciat, penas indicat.* Dark, doubtful, and disputed Laws, if any thing of that sort deserve the name, are one of the greatest evils that can affect a country, especially in criminal matters; because they are the most horrible means of tyranny and oppression. The Resolutions against Bribery, for preventing the corruption of Parliaments by accepting Offices, were afterwards enact-

ed by Statutes. Even to render effectual the Law of the Land as to Minors, a Clause was enacted with penalties. And if this Law of Parliament-Incapacity, as the Gentlemen call it, be so very reasonable and salutary, why grudge an Act of Parliament upon it to remove doubts, and let every man know what he is liable to. It will not be acquiesced under, while it is nothing but the *Dic-tum* of Doctors and Professors, the *ravings* of Journalists and *Precedent-men*, the Mandate of a *Minister*, the progeny of an *Ordinance*, or the brood of a *Resolution*. But,

Secondly, The other Incapacity by *Resolution*, which though not penal, is as *privative* as the former, in the way the Gentlemen construe it, as a direct Disability instead of a declaration of a want of legal Capacity, or Incompatibility ; this also is dangerous in the highest degree, both in respect of the extent to which, according to the doctrine upon which it is built, it may go, and in respect of the Power by which it is produced.

The Gentlemen have not been pleased to mark out any limits to this extraordinary Power of disqualifying, or declaring ineligible, as they term it, by Resolutions ; nor indeed can I see how any limits can consist with their doctrine of an absolute and uncontrollable Power in the House of Commons to make such disqualifying Resolutions. This doctrine so sets at naught all the Principles of the Constitution, that it is impossible to say to what extent the Power may not go. If the Law of the Land were the rule of these Resolutions, and they were merely *declaratory*, as we have argued and have endeavoured to prove from all the Cases, the boundary would be known ; but then there would be an end of the doctrine of In-eligibility *singly* by Resolution.

If

If such an absolute power of *resolving* Incapacities is established, the old Ordinance of the Lords for excluding Lawyers, may again come into the Writs, for the sake of some Lawyer who does not always choose to be the Tool of a Court, or the Slave of a Minister, or his Minion, with an exception only of Lawyers in the King's service.

If there is a troublesome Alderman of London, whose situation and disposition renders it impossible to take him off, *resolve* that no Magistrate of the Metropolis is eligible; and if a pretence were necessary, (which absolute Power disdains,) give for a reason that he is to attend the Functions of his Office.

Does the commercial world furnish sturdy Patriots, why not *resolve* that Merchants cannot be chosen, who have an interest always to oppose the laying on of Duties.

Is it inconvenient to hear the Din of the Colonies, declare that no man born in America can sit in the House of Commons.

Because the interests of England and Ireland sometimes jar, exclude all who have estates in Ireland, or are Members of either House of Parliament there.

If a physician should be chosen, illustrious enough to be proscribed, as Doctor Lucas was in Ireland, where he is now the Patriot Representative of the Capital, nothing more is necessary than a *Resolution*, that the Medical Faculty are incapable of being elected.

All that can be said is, that this would be, as the Commons expressed themselves in the conferences which have been cited, a most expeditious method of changing the Law. It is indeed *celeri certare sagitta*. It might, however, be convenient, if this Constitution were to be adopted, to leave a dispensing power with the King, or his Ministers, and then

then the Lord Chamberlain might licence Members of Parliaments as he does Plays.

If this Resolution-Law be the Law of Parliament, there is not so far as I can see, one Class of men, one Order or Profession, who are, for an instant, protected by the Law of the Land, or the Constitution, against a Resolution rendering them ineligible, if some unlucky man shall ever happen to be of importance enough to call forth this feathered arrow to make rid of him.

The Author of the *Case* carries the doctrine even to individuals, and he has a very comprehensive rule for the application of it, viz. the particular circumstances of the *Case*, and general principles of constitutional policy. In some future time it may be a particular enough circumstance of a *Case*, that a man stumbled upon a particular Vote in some question; and it may be a very good principle of policy, that another has not given some test of his attachment to the Minister.

It was the constitutional learning of James the First, that most eminent Royal Professor of Despotism, that the Rights and Privileges of Parliament, were mere indulgences of the Crown, resumable by the Sovereign. Is it the lesson of this day, that the House of Commons may, by Resolutions, resume the people's Rights of Election, and reduce them to the state of a *Conge de lire*. For to what else does the doctrine of these Gentlemen go? Do they imagine that it will be endured, or that the people of England are already fit to receive it. Poison may be a medicine, but never in any quantity; and it is always dangerous when administered by a Fool. It is not even safe for the Fool himself.

So much for the danger of this second sort of Incapacity in the extent of it. Now as to the danger of the Power by which it is produced—A Resolution of the House of Commons—An Ordinance—

nance—Not a self-denying, but an arrogating and assuming Ordinance—A disabling Ordinance.

Ordinance, is a *note of Usurpation*, and will remain branded with its proper *stigma*, as long as any sense of the value of this Constitution continues. For the danger of it, we have but to look to the Proceedings of the Parliament of 1640, which *resolved* away the regal Government of these Kingdoms.

But, without supposing such an extremity, if this doctrine of the Power of Resolutions takes root, posterity, for aught any body can insure to the contrary, may see the Negative of the Crown expelled out of the Legislature by a Resolution of the House of Commons—Or a Resolution, that the Lords must pass all Bills by which the Commons grant aids to the Crown—Or a Resolution, that no Commoner shall be made a Peer without consent of the House of Commons.

To come nearer our immediate Subject; upon such a system of Power in the House of Commons, could any Resolution be complained of, establishing new Qualifications as well as Incapacities of Electors, or Elected, Elections being the object of the competent and exclusive Jurisdiction of the House, in which they are subject to no appeal? May we not, for example, see a Resolution copying after the Parliament 1640, that all Electors and Elected, should take the Communion with the church of England, to exclude sectaries, and no matter though it also cut off the forty five presbyterian Representatives for Scotland, if their consciences should happen to be very scrupulous?

The Author of the *Case* tells us, the House of Commons have not said, and he adds, God forbid they ever should say, who shall be Elected; they have only declared by their Resolutions, who by Law may not be Elected. What this Gentleman
and

and his Colleague *Writer*, mean by declaring Ineligibility by *Law*, we have fully explained from their own words. But no transition can be more easy than that from resolving who may not be Elected, to Resolutions who shall be Elected. And, indeed, Resolutions extended to a convenient length, as to those who may not be Elected, will at last pretty effectually determine who shall be Elected, by leaving none to be chosen but those of certain Qualities or Descriptions, with the help of a liberal interpretation of the *Viri discretiores et majus idonei*, which the Writ commands to be Elected.

But the danger of this power does not rest singly in it's being subversive of the very frame of the Government as investing one House of Parliament with the effect of legislative powers which is bad enough : It is no less dangerous in it's nature and in the manner and circumstances of it's being exercised, than in it's principle and origin. For here, again, the unkindly ideas of *judicial* discretion necessarily present themselves.

This arbitrary power of *judicial* resolutions is not like absolute government, which, in the hands of a wise Prince may be harmless, tho' so liable to mischief, that no man of sense would wish to see such a form of Government established, or to live under it. It is a discretionary power in judicial determinations, from which it ought, as much as in nature, to be excluded : And it is doubly dangerous as the discretion of a numerous body, not having the Pole Star of the Law to guide, or any rule as a compass to direct them. A discretion, so circumstanced, is most likely to turn out often to be the wildest extravagance of men ; the discretion of a multitude free of Rule and Law, being something very much of the same cast with the moderation of a mob.

But

But this discretion of arbitrary resolutions we have seen very well characteriz'd and expos'd in the Commons Conferences upon Oates's Bill. And what was the consequence of discretion being substituted in place of the Law of the Land; as the Rule of Trial, under the administration of justice by Empson and Dudley? When they were hanged, the race of bad men did not totally fail. To what enormous extravagance of punishments did the discretion of the Court of King's Bench go, in the bloody reign of James II. when once the Judges had determined, that it was in the discretion of the Court for misdemeanours at Common Law, to inflict what punishment they pleased, not extending to life or member. They inflicted punishments far worse than death; which may be a Scare-crow for judicial discretion in all ages. This instance is also treated in the proper manner, in the above conferences of the Commons.

But it is needless, in this climate, to enlarge further upon the danger either of ordinances or of judicial discretion. The authority of ordinances or resolutions of one House of Parliament to make Law, or to declare to be Law, what never was Law before, strikes at the foundation of the constitution. It destroys the equilibre of the Government, which exists in the ballancing of its different branches, and can only be preserved by maintaining the poise.

Ætheris immensi partem si presseris unam.

Sentiet axis onus.—

For the doctrine to be opposed to the power we are contending with, we may take it from King Charles I. in one of his speeches at the conclusion of a session, though the speech was made just after he had, inconsistently enough with his words, however conformable to his practice,

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given

given a very bad answer to the Petition of Right. —“ None of the Houses of Parliament,” (said he) “ joint or separate, what new doctrines sooner have been raised, have any power either to “ make or declare a Law without my consent.” Which last words we have only to vary, when speaking of one House of Parliament, by substituting in place thereof these others “ without the “ consent of the other two branches of the legislature.” The doctrine is so sound, that it was established by the Statute after the Restoration, which makes it a *præmunire* to affirm, that both or either of the Houses of Parliament have any Legislative Authority without the King.

And for the danger of the doctrine we grapple with, I shall also cite words, which the same King was instructed to use on another occasion, so apposite, as almost to be prophetic of the present dispute—“ If (said he) there should be such a secret “ of the Law, which hath lain hid from the beginning of the world to this time, and is now “ discovered to take away the just legal Powers of “ the King, we wish there may not be *some other* “ Secret to be discovered, when they please, for the “ ruin and destruction of the LIBERTY OF THE SUBJECT: for, no doubt, if the Votes of both Houses “ have any such authority to make a new Law, it “ hath the same authority to repeal the Old; and “ then what will become of the long established “ Rights of the King and *Subject*, and particularly of MAGNA CHARTA, will be easily discovered by the most ordinary understanding.”

Thirdly, I cannot, after hearing so much of *Precedents*, forbear, upon this occasion, to take notice of the danger of *Precedents* that trench upon the Constitution, which is so great, that they cannot be too carefully avoided, nor any pains be too much to resist and repel them.

Preceden

Precedents are in their nature most prolifick, and therefore to be withstood in their first beginnings. One eternally begets another, in an endless succession. We need not here produce the testimony of the Parliament 1640. The example of Sir Robert Walpole's expulsion and incapacity, is *now* sufficient for our purpose.

Lord Coke says, " It is not almost credible to foresee, when any maxim or fundamental Law of this Realm is altered, what dangerous Consequences do follow." And he is speaking of alterations made in a constitutional way, by Act of Parliament, for he refers, for an example, to that statute on which Empson and Dudley founded their flagrant oppressions of the subject. Precedents of unconstitutional power are yet more dreadful, because they are at once dangerous in their origin, and dismal in their consequences, the wildest and most extravagant, like illicit amours. But of all others, Precedents that establish *principles* destructive of fundamental rights, are the most fatal; as they have a direct and immediate tendency to work a subversion of the constitution, and resemble the letting in of water, which, by running, enlarges it's own passage, till it gush into a torrent of devastation.

Mere acts of acknowledged violence, either by judicial or ministerial power, can do little general harm, and are easily corrected, as we saw in the case of general warrants and seizure of papers, which no body undertook to justify with as many precedents as could fill the Office of a Secretary of State. But suffer mischievous principles to settle, and they presently become a part of the system, incorporate with the constitution, and are interwoven in it's frame.

If, as an able writer observes, that great maxim of politicks were pursued by governours, never

ver to enter into measures to answer particular occasions, without considering how far that step, which their necessities may drive them into, can prove fatal and dangerous in its consequences; I say, if this maxim were followed as it ought, we should scarce ever find precedents established which one time or other may be brought to justify the most abominable transactions, and to destroy the liberty of these kingdoms.

However, if Ministers and Men in power will offend against the duty they owe to their country, it indispensibly behoves every other man, in his station and sphere, whatever it may be, to resist and defend against such attempts. It is not so difficult to foresee, as hard to prevent the consequences, if persons of weight and influence in the state are induced, by cowardise or corruption, shamefully to give up the People's rights, and even to join in invading fundamentals, flattering themselves, perhaps, that when they have, by their servile compliances, gained some present advantages to themselves, it will then be time enough to redeem the common-wealth. It has been justly remarked, that some such notions as these at first led Pompey to join in the measures of those who intended to subvert the Roman liberties; and afterwards, when he repented and desired to save his country, he found them grown too strong, and himself too weak, to do any good.

There is another sort of danger in precedents, and though it does not so properly belong to my argument, it is very fit to be considered by some folks. They should recollect, what has been often observed, that vindictive precedents are generally found to be dangerous weapons, which carry a double edge, one for their contrivers, as well as another for the devoted sacrifice; and ought therefore to be equally avoided, both in
policy

policy and humanity. Lord Coke mentions a notable instance of this sort, in an Earl of Essex, who caused that absurd Act of Parliament to be made for attainting people without hearing them; and was the first himself who suffered in consequence of it, the person at whom it was aimed having escaped it's bloody edge.

Where virtue controuls personal resentments, this is justly represented as the language of a true Patriot, " I hate this Man, and desire to do him " a mischief, but the Love of my Country has " greater power over me." And forbearance, sometimes, is a very useful political rule. It is greatly praised in Philip of Macedon, and with this commendation of itself—that it was *ingens instrumentum ad tutelam regni*. It is also recorded, to the honour of the Romans, as a nation, that though the Carthaginians had committed *nefanda facinera* against them, both in peace, and during truces, yet they did not retaliate when they had opportunities, but rather studied to do what was worthy of themselves, than what might have been lawfully done to those who had given them such provocation. The example of Miltiades is no less worthy of imitation, as well as honour, as a part of whose character it is said, *Amicior omnium libertati quam sua dominationi fuit*.

In the fourth place. The danger of the propositions, the erroneousness of which, we have endeavoured to prove, will appear, if we reflect upon the object, which is affected by the doctrine and principles against which we contend, and the consequences which may follow them.

The object is the Right and Freedom of Election, the bulwark of our Liberties, the basis of the Constitution. If these are hurt, the foundations are destroyed. They are the most important part of the privileges of the House of Commons, because they

they are the most valuable of the privileges of all the Commons of England, and the defence of all the rest. Therefore, as a Parliament-man said in the debate, as to the Attorney-General, in 1614, " The Case of the House has always been for their " privileges, but in nothing has their care more " appeared, than the preservation of the right of " Election of the Members this House."

Take away this unalterable and unalienable Right, and to borrow the words of a bold woman, the Countess of Arundel, in a speech to Henry III. " Where are the Liberties of England so often reduced into writing, so often granted, and " so often redeemed." *Illo jure ablato non tam illum amisisse quam cum illo omnia interiisse videntur.* This is the Right for which we would surely wish to have the promise of Polyphemus to Ulysses, that it should be the last to be devoured.

As to the consequences of an invasion of this Right;—These are an illegal, unconstitutional representation, and may be the packing of a Parliament to the destruction of the kingdom. If in the election of Members of Parliament, a Minority is to be set up against a Majority, upon the ground of arbitrary and illegal incapacities, contrary to Common Right, Privilege, Property, and Constitution, under such a Dispensation, are the mere *Caput Mortuum* of speech.

But to speak more fully on such a subject, I choose to do it from the Annals of England. It is in our history, that Richard the II. in pursuit of his insatiable lust of arbitrary dominion, took every unconstitutional method he could think of to procure a Parliament of his own abject creatures, by the help of such slaves, to subdue their country to his tyrannical yoke. " And (continues the " Historian) if any were elected not agreeable to " him, *Sheriffs were ordered not to return them, but*
to

“ to cause others to be chosen in their room. Besides, as the House of Commons were the sole Judges in the affair of Elections, he was well assured, that such a Parliament would confirm, or reject whom he pleased.”

“ It must not, (proceeds the History) be thought very difficult for a King of England to execute such a project. Experience has since confirmed, on numberless occasions, that by the like ways, it is very possible to cause representatives to be chosen devoted to the court. However, Historians remark, that it was in this Parliament that such practices were first used. But it must likewise be added, that it was one of the principal causes of Richard’s destruction. And indeed, (says this same Historian) *it is impossible that a nation can see their Liberties in the hands of men whom they have not themselves freely chosen, without desiring to be delivered from such an oppression.*”

The Parliament, so composed, was opened with a Speech, made by a Bishop, to prove that the regal power was unlimited, and that such as endeavoured to bound it, deserved the severest punishments. In conformity to that principle, which in that Parliament met with general approbation, were the proceedings of the Parliament which made a perfect massacre of the nation; for the account of which we refer to the History.

“ If, says Rapin, the Parliament of 1386, deserved to be called the *Merciless*, I know no name odious enough for this. This assembly made no scruple to sacrifice to the passions of the King and his Ministers, *the most distinguished Lords* of the kingdom, as well as the LIBERTIES AND PRIVILEGES OF THE PEOPLE—— They approved, as conformable to Law, the Opinions, for which nine years before, the Judges were condemned——“ And the Judges who attended during the sitting
“ of

“ of this Parliament, *decided*, that when the King
 “ proposed any articles to be debated in Parlia-
 “ ment, it was High Treason to bring in others
 “ before the King’s were dispatched.”

The whole ended in one of the strangest things to be found in the whole History of England,—An Act of Parliament, by which the whole power of the nation was devolved to the King, twelve Peers, and six Commoners.

The Historian who relates these facts, could not help *staying here*, as he expresses himself, a moment to reflect on the Constitution of the English Government: And while we have his Remarks, we need not offer any of ours on this occasion, “ It is certain, (says he) the institution of Parliaments is very advantageous to the kingdom, being the only SUPPORT OF THE LIBERTIES OF THE PEOPLE, who without that, would have long since fallen into a fatal slavery. But on the other hand, it cannot be denied, that these Assemblies become some times very dangerous, when influenced by popular Factions, or the cabals of an ambitious Prince. Accordingly it has often happened, that, instead of procuring the good of the Realm, they have produced confusion, and the subversion of the Laws.”

He adds, “ It may be farther observed, that the violent method practised by Richard to attain to arbitrary power, I mean, *forced Elections*, and the Opinions of the Judges, was exactly copied in our days, by one of his successors, who had, without doubt, the same intention. But we may add, that the attempts of these two Monarchs, served only to promote their own destruction, and that their designs came to the same catastrophe.”

Richard was deposed, and this is one of the Articles on which the sentence of deposition is founded.—

ed.—“ That although by Law and Custom, the
 “ *People ought to be free to choose* Knights to repre-
 “ sent them, to propound their grievances, and
 “ provide remedies for them ; yet the same King,
 “ that he might obtain his own rash will in Par-
 “ liament, directed by writs often to the Sheriffs,
 “ to send such as he named, some of whom he
 “ induced by favours, others by threats and ter-
 “ rors, and others by bribes, to consent to things
 “ prejudicial to the Kingdom, and grievous to the
 “ People.”

These things were written for our instruction, I
 shall not say—for the instruction of us *upon whom*
the Ends of the English Constitution are come.
 But it is for us to judge, whether the prospect we
 have of improvement in publick or private virtue
 in the ages to come, entitle us, in the present, to
 unbend the caution which past examples suggest to
 us, or to hide from our eyes, truths calculated to
 keep it alive, which are recorded in the faithful
 page of history.

I would observe, in the fifth place, upon this
 head,—That of all the dangers which can affect
 the Rights and Freedom of Election, none is com-
 parable to that which may come from the House
 of Commons, if that should ever be packed, de-
 bauched, or corrupted to betray the Liberties of
 the People, as we have seen it was in the reign of
 Richard II. The House of Commons is the *Salt*
of the Constitution ; but if the Salt bath lost it's fa-
vour, wherewithall shall the Constitution be pre-
served. Here, as a safe harbour, the Rights of
 Election, as the chief of the privileges of England,
 ought to be secure ; but if *there* they are destroyed,
 it may be said, as Cicero, speaking of the battles
 of Syracuse, says of the power and glory of the
 Athenians, *in hoc portu libertatis naufragium fac-*
tum fuit.

No doctrine, therefore, can be more alarming or dangerous, than that which tends to set the House of Commons above the restraints of the Constitution, and to deliver them from the checks of all Law, in the exercise of their Right of determining Elections. If they are invested with such an uncontrouled power in that Judicature, as is now contended for, a majority may, by means of illegal Decisions, wild Expulsions, and unconstitutional Incapacities, model the House for any purpose, as was done in the time of Richard II. and in the Parliament of 1640. By such doctrines, we renounce the protection of the Law, and the security of the Constitution, and deliver over our Liberties as a prey to the chance of things and fate of times : Or we lay a foundation for a treacherous surrender of them, if a Minister should, in any future age, be found audacious enough to make the purchase, and profligate men ready to receive the price, *should be appointed* by arbitrary decisions to sit in the place of Representatives of the Peoples choice, sufficient in number to conclude the infamous bargain, which Richard, and the Commons whom he set in Parliament, finished and executed.

Far be it from me to say any thing to give the People a disgust to Parliaments. This is not my design, nor was it the design of those who have said, as it often has been in the best of times, and by the best of Patriots, and the ablest of Statesmen, that if England should ever be ruined, it would be by her Parliaments. On the contrary, we mean to signify that *there* lies our great security, but that we must keep up the Out-works, in order to preserve the compleat strength of the Fortification.

Human Nature cannot dispense with curbs. They are not more necessary to maintain government, than they are to controul those that do govern.

vern. If we give up the checks by which the Constitution has restrained the House of Commons, we endanger the Being of itself. For, if left without controul, in their judicature of Elections, they may destroy the Rights and Freedom of Election: And nothing but free Elections can secure to us a House of Commons upon the principles of the Constitution, that is, a fair representation of the Peoples free choice.

As we therefore value the security derived to the Constitution from the House of Commons, we must assert the freedom of Elections, in order to preserve, not the form only, but the substance of the institution. If that will answer the end, we are sure nothing else can prevent the corruption of Parliament. And with a corrupt Parliament there remains not only no security for our Liberties; but a House of Commons debauched into submissions to bad Ministers, or measures inconsistent with Liberty, must demonstrably be the surest pledge, and in the end, with the greatest ease, effect the firmest establishment of the worst sort of tyranny. It would be a tyranny established by Law, and apparently with the consent of the People, their false Representatives forging the chains they are to wear, and the shadow of Freedom which they exhibit, only more effectually deluding into a total loss of the substance, and depriving of the means of retrieving it.

It is the observation of Machiavel, that where nothing but the appearance of freedom is preserved, there the most severe servitude is always intended:—Of the truth of which observation some modern republicks are a proof. So mixed Governments, when degenerated, are the worst enemies to Liberty, though they were the best device to preserve it. From the time of Cinna, to the attempts of Julius Cæsar, corruption, it is

certain, had this effect in the degenerate Republic of Rome.

Tyrants that subsist by mere force, and where the will of a Monarch is the only Law of the Government, have few friends but men of the sort. But where there is the figure of a free constitution, and the people seem to have a hand in making their own fetters, by the voice of something in the shape of their Representatives, the cowardly and corrupt are of the side of the tyranny. They participate in it, and are paid for supporting it, and therefore they uphold it over the better part of the Subjects.

No Government, as has been justly observed, was ever more absolute, than when the Roman Emperors affected to rule by Law, with the form of an awed, a corrupted, and a subservient Senate: And of this there was not an imperfect image in our own Country in the Reign of Henry the Eighth.

From these examples we may learn, that we shall not be secure against danger, merely by keeping up the antient form of our Government, as we received it from our Ancestors. We must retain its virtue and essence. Let us therefore *contend earnestly for the constitution once delivered to us*; and with its outward form, study to preserve its inward vigour, and not suffer any of our Rights to be encroached upon or invaded. Above all, *let us hold fast* the rights and freedom of Election, upon which the whole depends: And let us execrate and abjure every doctrine that tends to enervate and endanger them, by setting up any unconstitutional power, or pulling down any legal fence bounding the powers which the constitution has instituted.

Sixthly and lastly, We might reckon among the dangers of the doctrine, in throwing down which,
this

this discourse has been employed, the difficulty of the remedy in case of any wrong being committed under the pretence of that unconstitutional power, which the doctrine strains hard to establish; and the disagreeable effects, which attempts to exert such a power, may at any time produce, and which may grow more considerable if the pretensions to it are persisted in, and the wrongs done not rectified.

Wherever there is an evil, the danger of it must be greater, as the remedy is more difficult. In proportion therefore to the value of the rights of Election, the evil of hurting them is increased by the difficulty of the remedy.

The Gentlemen themselves, heedless of the consequence, in case their reasoning in support of the power they contend for should be found to fail, have aggravated the danger by insisting upon the circumstances of the jurisdiction of the House of Commons being exclusive and without appeal: Upon which, indeed, they have rested their whole Argument for their power being uncontrouled by any restraint of Law. For the unavoidable consequence is, that if a wrong be committed, the contest is directly and immediately between the people and their representatives.

I am far from thinking, and I have, somewhere in these sheets, said, there is not a defect of a constitutional remedy for such an evil. The history of Parliament, in instances to which we have referred, points out the remedy; and the daily Journal of the times rings it in our ears from all quarters of the kingdom. The remedy most undoubtedly is, an appeal to the just and legal prerogative of the Crown, with which the constitution, for the wisest of purposes, has entrusted the Sovereign, and which is a fundamental of this government :
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The Sovereign being thereby constituted the great umpire, not only between the two Houses of Parliament, but also between the People and their parliamentary representation.

The power of Prorogation or Dissolution, interposes in the case of a contest between the two Houses : The negative in the Legislature vested in the Crown, is a check upon their own Representatives, in their legislative capacity.—And to that Prerogative the People may, and often have appealed by petition against bills passed by both Houses of Parliament. If the People are injured by the Act of their own Representatives, in the exercise of their more collateral, incident, and inferior Powers, the same Prerogative of the Crown may be appealed to for a Prorogation or Dissolution, which remedy the Crown has often interposed of it's own accord.

This great Prerogative is a trust for the People, and subsists for their security. For that very end and purpose it was by the original compact derived from them, together with the Crown in which it is lodged, as truly as the powers of their own Representatives, are derived from them by Election. Both are alike fiduciary, to be exercised as all the Prerogatives of the Crown and all the powers of Parliament ought to be, for the commonweal of the Realm.

They are much mistaken, who imagine the Prerogative of the Crown is a peculiar estate of the King, in which the People have no interest : for in this also, they have an inheritance as one of the guards and securities of their Liberties : And the exercise of the Prerogative is not the personal Act of the Prince, but the function of the royal politick capacity of the Sovereign, the end of which is the same with that which is the end of all government, the good of the People : And all the
Acts

Acts of the Crown are guarded with constitutional checks and restraints, to secure the welfare of the Community in the exercise of them. It is not therefore the *legal* Prerogative of the Crown which is the object of dread, but usurpations of power which assume that name, and transgress the bounds of the trust reposed in the supreme executive power.

Thus much we have said, to assert the *reality* of the remedy of the evil in question, and to explain the principles upon which it is established as a solid foundation; which was perhaps more necessary than to point out the difficulty of the remedy, which is sufficiently manifest from its very nature. Upon *that*, therefore, we shall only say, what every one must feel, that it is an awkward and disagreeable situation for the People to be reduced to an appeal from their own Representatives, whom they themselves have chosen to defend their rights, to propound their grievances, and to provide a remedy for them, as where they have placed their trust, their natural confidence ought to be: And the proper charge and office of their representatives is to be a check upon pernicious counsels given by civil Counsellors to the Crown. The best compliment that can be paid to such a situation is, that it is not a hopeless state. Neither ought it to diminish in our eyes the value of the institution of Parliaments, the very term or endurance of which, as well as their Constitution, is a security against an extremity of power in them to do mischief: And if they are *freely* and *prudently* chosen, they cannot *naturally* be supposed to fall under such an influence, as to require the interposition of any external or extraordinary remedy.

The effects of an unconstitutional power, however, must become much more dangerous, when the pretensions to it are persisted in, and the constitutional

stitutional remedy is not applied to rectify the wrongs that are done by it. This may prove a very dreadful situation, and the consequence may lead to dangers of the first magnitude. I cannot betray the cause of Liberty so far as to say, that even for these, if unhappily they were to exist, there is no cure. But that is indeed a very serious subject of contemplation. There is a line there, which it does not belong to theory to draw. Necessity, and necessity *extreme* only, can point it out: And terrible must be the rents that let light enough in to make this secret legible. It is the *knowledge of good and evil*, unhappily learned only by eating of the forbidden fruit in a very great quantity *.

Pre-eminent

* I am not, however, so shy as the able and learned Doctor Blackstone, of adopting the opinion of the great Mr. Locke upon this delicate subject. For it is the opinion naturally taught by a sense of English liberty, and read in the unwritten volume of the Constitution, by those who never studied Treatises on Government. While I have the fundamental principles of the Constitution with me, and the great Charter of our Liberties written in the Revolution, I scruple not to head the footsteps of Mr. Locke, who was one of the greatest oracles of the Constitution, of civil policy, and of the divine Laws of Nature that are written in the Heart of Man, as the original code of his unalienable rights. Neither am I afraid to speak out what every Englishman may, and ought to think, that there is a remedy for the very worst situation that things can be brought to: And I shall never shun the opportunity of saying it, when Questions of Liberty, and that concern the vitals of the Constitution are agitated; which are the only times that people will give themselves the pains to think about it. Then may that be said, which never ought to be unknown to the People of this Contry, nor forgotten by them.

Mr. Locke certainly does suppose (and it was only supposing what we all know has happened;) that there may be a dissolution of the Government: And it is remarkable that he ranks among those breaches of trust in the executive magistrate, which (according to what Mr. Blackstone calls Mr. Locke's *notions*;) amount to a dissolution of the Government, *not only* all unconstitutional means used to corrupt the Representatives, and influence Electors;

Pre-eminent in difficulty may that remedy be said to be, which is the last effort of oppressed Liberty. And before turning to which all ordinary means must have failed of bringing to justice those criminal subjects, who by their influence and their

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power,

Electors; but also any method taken to *prescribe what manner of Persons shall be chosen*. "For," (says he) "thus to regulate Candidates and Electors, and *new model the ways of Election*, what is it but to cut up the Government by the roots, and poison the very fountain of publick security." The position of Mr. Locke, which Mr. Blackstone says, however just it may be in theory, he cannot *adopt*, nor argue from it, under any dispensation of Government actually existing, is this, "that there remains still inherent in the People a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them: For when such trust is abused, it is thereby forfeited, and devolves to those who gave it."

But with the good Doctor's leave, if we cannot adopt or argue on this conclusion of Mr. Locke's under any dispensation of Government actually subsisting, I know not when we shall: For if the Government were to come to a *dissolving* state, which must precede an actual dissolution, we should not *argue* but *act* upon the principles asserted by Mr. Locke: And I know nothing so effectual to prevent the necessity of acting upon them, as our being all very well acquainted with them, and feeling their proper energy. For which reason there may be very fit occasions for arguing upon these fundamental *notions*, as Dr. Blackstone would call them, which lie below all other foundations. And, however well the important post of liberty may be secured at present, it can never hurt lawful Government, that we sometimes speak of the cure for tyranny, to which all unlawful usurpations of power, and invasions of the Constitution, are but the approaches.

I shall therefore take the liberty on this occasion to say, that I presume it is sound doctrine, that Parliament itself has not a power to make a Law destructive of the liberty of the People, because they are sent to Parliament to preserve and not to destroy the People's rights. And if the whole three branches of the supreme power of Government were to combine to subvert the Constitution, which is their own foundation, and to overthrow the rights and liberties of the People, there is in this Constitution a reserve, in the first principles of all power, of a remedy, though it is an awful one, for so tremendous an evil. For our liberties and privileges must live when we are dead. Natural

power, their counsels or their conduct, have been the base instruments of overturning the rights of the People. But all invasions of the Constitution have a tendency to open the access to that state of things, which might call forth the most difficult and

ral liberty is the first state of all men ; but civil liberty is the second nature of Englishmen.

When the ends of Government are destroyed by the abuse of it, the rights of Government cease, and power reverts to its own fountain. When the original compact is broken, the bonds of the Constitution are dissolved, and the body politic resolves into its constituent elements. In that extremity, and till such an extremity, the last remedy is not to be looked to ; in that hour of necessity, first principles, the virtue of which can never evaporate, step forth with their supreme authority to repair the breaches, and restore foundations.

That is an unnatural state of things, and therefore is painful. The Constitution feels the anguish of an universal dissolution. But she is then in a parturient state, and from the teeming womb of her dissolving frame, under favourable auspices, the fair Child of Liberty is, in the propitious moment, born again, and clothed afresh with the beautiful array of a legal Government.

God forbid ! that we, or our posterity, should ever see this terrible scene, or share in the agonies of such a painful regeneration. Who, so lost to humanity and to the welfare of mankind, as to occasion or invite the dread appeal made by the Countess of Arundel, who in the face of Henry the III^d. first invoked the *broken liberties* of England, and then said, " therefore I, though " a woman, with all your natural Subjects, do appeal from you " to the Tribunal of God, the great and terrible Judge, let him " revenge us." At which words, as the Historian relates, the tyrannical King was confounded, and held his peace, because his own conscience told him she spoke no more than the truth. But the principle of lawful resistance, as the Avenger of forfeited Allegiance, and of an infracted Constitution, is the great ballancing power of this Government, and its own force is everlasting.

This is the mystery ; which is hid from many Ages and Generations ; and happiest these from whom it is hid ; but it has been too often *revealed*. It is the great *arcana*m of the Constitution, which lies locked up under all the bolts and bars with which the love of Ourselves, the love of our Country, the love of Posterity, can fasten it in ; and nothing but the same Keys can unlock the solemn Temple in which it is deposited ; a Temple not to be approached without reverend Incense to the God of Liberty, whose unconsecrated Priests sacrifice her devoted Enemies to the injured rights of Men born to be free.

and dismal of all remedies. And those who are not properly alarmed at smaller dangers, take the readiest course to bring on the greatest evils and mischiefs, to which, in their nature or consequences they can lead. To such a calamity, were it to happen, those doctrines would be deemed necessary, which, upon false Principles, and by a manifest perversion of the Law, attempt to establish an unconstitutional Power, destructive in its nature, difficult in its remedy, and that in its consequences may prove subversive of our Liberties.

Here we should shut up the Argument, but the head of danger naturally turns our eyes from *Argument* to *Evidence*; and the Subject we have been upon, hardly permits us to quit it, without taking some notice of present appearances, which are the actual consequences of the doctrine we have been proving to be dangerous as well as erroneous.

Had we nothing else to judge from but the immediate effects which we behold, the danger of this Doctrine, and of the Power for a prop to which it is coined, is too glaring to be disputed. The effects which we see, and to see which, we have but to keep our eyes open, cannot give favourable impressions of the Cause from which they proceed. A measure which the whole Nation dislikes, and cries out against, does not bespeak a commendation of the principles by which it is justified. And will an obstinate adherence to such Principles, and a pursuit of such Measures produce no danger? It is not natural motions, but strains occasioned by wry steps, that are accompanied with swellings: And if these are not timely reduced by emollients, they fester, and prove dangerous to the Body.

I do not know if Measures, which force to just Complaints, and extort lawful Remonstrances are guiltless, but I am sure the actual state of Govern-

ment, which for some years has distressed this Country, and rendered us not only disturbed at home, but contemptible abroad, and has, I suspect, made us as unsecure without, as we are unquiet within, is not innocent even of those various and repeated infamous Outrages, committed by different associations of a lawless Banditti, who are the terror of the quiet and peaceable Subject, whose habitations and property they invade, and even assault their Lives, trampling upon the Laws of their Country, and rebelling against all Order and Government. Some men, like sacrilegious Thieves, who steal in midst of a conflagration, are wicked enough to take encouragement from just and legal Remonstrances, for invasions and breaches of the Law, to set all Law at defiance, and throw off all subjection, thinking it safe to despise and resist lawful Government, when they hear improper acts of exertions of Power complained of in a legal way. The truth is, Misgovernment is the greatest foe to the respect due to Government: And such unhallowed Proceedings are not the least mortifying circumstances that attend times of general Complaint, however just and necessary, nor among the smallest dangers that accompany measures which are the cause of publick dissatisfaction and spreading discontent. It could not be said with more reason, of the people of whom it was said, than it may be of us, *Externis victoriis aliena, civilibus etiam nostra consumere didicimus.*

One thing is visible, the Kingdom at this moment is in labour, and daily brings forth Petitions, Complaints, Murmurings, Apprehensions. These are serious things in such a country as this. No body knows to what they may grow: And those who would most wish to prevent bad consequences, can least foretell what may happen. It is none of my intention to excite Sedition and Tumult. *Motos præstat*

præstat componere fluctus. But indeed there is no need of writing to raise a flame in the Kingdom: The fire already burns. Nor is it at all surprizing, if there is any justice in the reflection which we quoted from the Historian. Rapin did not write the History of the Middlesex Election, nor compose his Work from the news of our daily Papers, but he has told us, as we have seen, that it is impossible a Nation can see their Liberties in the hands of men whom they have not themselves freely chosen, without desiring to be delivered from such oppression.

A Fact, even in a single instance, corresponding with such an observation, is a just foundation of Complaint. But principles attempted to be established, that promise nothing but as many repetitions of the same Act, as emergencies may at any time require, and that cut up by the roots the Rights that have been injured—These are not to be endured.

It is not mere empty noise and clamour that we hear, which may be raised we know not how, and goes as it came, because there is no ground for it, like a sudden blaze which quickly dies away for want of fuel to support it. The business in hand is a matter of *Right*, upon which men can judge, and that wise men will ponder, as it concerns every Member of the Common-wealth. There are not wanting, as Sir Edward Deering said, men of birth, quality, and fortune, who have been of good assistance to the state, and are no ways obnoxious to it, who stand forth upon this occasion, in support of what they assert to be the Rights and Privileges of the people of England; and the opinions of such men must have weight with others less able to judge of the wrong, but equally liable to suffer by it.

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Considering the person from whom it came, it was not an unsensible answer which Gallio the Roman Deputy of Achaia, (a man whose character it was, that *he cared for none of these things* which did not immediately concern his own Government) gave, when the Jews brought St. Paul before his Judgment Seat. " If it were a matter of wrong, " O ye Jews, reason would that I should bear with " you, but if it be a question of your Law, look " ye to it." This business in hand is a great *matter of wrong*, and Reason will, that Representations and Remonstrances upon it should be borne with. It is a great *Question of our Law*, and the People ought to look to it. And if the Ministers of Government do not also look to it, they will ill look to themselves. For Ministers are but the servants of the People, and if the People are not served, much more if they are hurt, they will not only not support, but they will oppose, till they pull down those who do not serve them.

It has been well observed, that it is an error to which those at the Helm are frequently liable, to disregard the complaints of the People. Being always surrounded with Flatterers, or ignorant of what passes any where but at Court, they are apt to imagine, that having a few of the great men for them, the rest of the people are to be counted as nothing. But it always has happened, and it always will happen in such a country as this, that those who reason in this manner, find at length to their cost, that the great men, and Kings themselves, have no more power than private persons, when unsupported by the People.

It is even very liable to mistake, to judge, in all Cases, of the sentiments of the People by those of their Representatives. For as the Representatives debate and determine upon matters brought before them without Instructions from those they represent,

present, their Resolves, in one sense, can be considered but as private opinions, though while they are within the bounds of their legal Powers, and upon matters concerning which, they have, by the Constitution, a proper Jurisdiction, the extent of which is not exceeded, their Resolutions are of force to bind the People. Upon which account it is, that we see from History, the people have often appealed from the decisions of Parliaments, when thought too prejudicial to the Nation, and have, in Cases of the last extremity, even appealed to arms. But the Constitution is now happily armed with remedies which supersede those caustick medicines used in the rude and barbarous times.

In such Cases, Ministers who have deluded themselves in a fatal security, as to the sentiments of the People, perceive, when it is too late, that the small numbers they had gained, are a weak defence against the fury of an enraged Nation. This was remarkably verified after these Kingdoms were happily and seasonably delivered from the dominion of Queen Anne's Tory Parliament and Ministry. For a while, five or six hundred persons who compose a Parliament, and perhaps some hundreds of Magistrates in Towns, and a few Freeholders in Counties, who, by ways and means, may be got upon particular occasions to present Addresses of Approbation, may be passed upon the world as speaking the sense of the body of the Nation, and the rest be reckoned as nothing: But when the critical time comes, the greater number must be taken into the account, and then that of those who are in office and in trust, appears to be infinitely small in comparison of the whole.

Such Reflections as these we would not push to an extravagant length, nor would we be understood to point at any improper applications of them. But they are the truths of History, and the experience

rience of past times: And it must be a serious wish, rather than a vain reproach, that Ministers would, in place of some of the idle and dissipating, not to say shameful and flagitious amusements, by which only some endeavour to qualify themselves for their important situations, as if the great concerns of the Nation were less than Play, and to be more lightly sported with than betts set upon the dice;—if instead of these they would try to learn both what this Countty has done, and what she has suffered. By that means they would certainly consult their own interest more, and serve their Country better. They would, on such an occasion as this, know the importance of the sense of the Nation, and the value of national opinions and inclinations.

The present question is, in a peculiar sense, a popular question, and there is no denying of it. The people support their own Rights. We might have guessed, if we had not seen it, upon what side the Popular Opinion would be. But Popular Opinions are no objects of contempt. Even such a Tool of a Court as Bacon, could tell his Master upon a very grave and weighty occasion, “ That “ Popular Opinions are to be regarded, and that “ Kings had always done so.”

It was the Parliamentary Language of old, *the* PEOPLE OF “ ENGLAND MUST BE SATISFIED.” Till they are, they will not be quiet. *Flamma per incensas citius sedetur aristas.* We may be told of the Mob Petitioners of London, of Middlesex, Yorkshire, &c. But I will tell those who talk in that stile, such Mobs as these Petitions come from, will decide any controversy that can be raised in England, if the gauntlet is thrown. And whoever they are, that make a mock of Petitioners, they may depend upon it, the Standard of Liberty will be followed, when the Banner of Power has but

few to attend it; and those more likely to desert their colours, than to support the cause in a day of trial: Men love Freedom, and Liberty is an *Ætna* which burns in the breasts of Englishmen, with an extreme hatred towards those who oppose it.

One cannot help being sorry to see the reign of the first *native* Prince of the House of Brunswick, disgraced, as it has been, with complaints of invasions of Liberty. Under the benign government of his Majesty's two illustrious ancestors, whose memory these Nations revere, the bitterest enemies of the Protestant succession could not, even in the days of the most malignant disaffection, and when every corner was ransacked for ground of clamour, bring such an accusation. These Princes were the glorious protectors of the liberties of Europe, and the faithful guardians of the Rights and Privileges of these kingdoms. They knew that the Crown they wore, was the gift of that Liberty, which it was given to maintain.

His present Majesty also most graciously assured his people, when he first ascended the Throne, that their Liberties were as dear to him as any Jewel of his Crown; and, indeed, they are the brightest Jewel in it. Nevertheless, Complaints are not new—Complaints of such an impression, that for the pattern of them, we must go back beyond the Revolution—Complaints that cannot but be grievous to the real friends of the Hanover Family. It is, however, a happy circumstance, that even Complaints of this sort do not reach the justice of his Majesty's Royal Dispositions, or affect the loyal affection of his faithful subjects. To his Majesty's own paternal goodness, will chearfully and with gratitude be attributed the acts of his government in favour of the Liberty of the Subject. The Constitution tells us where to lay the blame of Measures that are injurious to the Rights of the

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People,

People, and of a tendency to rob his Majesty of the hearts of his Subjects, which are the best garriſon of the kingdom. We know where Reſponſibility is ; and we know the power that can make thoſe who are reſponſible, amenable, and from which, no Power nor Protection is able to ſecure the greateſt, if once it is effectually roused to call the Criminal to account. Nor let any one draw aſide the veil that hides the Throne in ſacred Re-
 verence. His Majesty may adopt the words of his illuſtrious Predeceſſor Queen Elizabeth, who was not behind in penetration with any Prince who-
 ever wore her Crown, in her answer to the Com-
 mons of England, on preſenting their Thanks for annulling Monopolies, which had become a Nati-
 onal Evil ; “ I beſeech you,” ſaid that great Queen,
 “ that whatever Miſdemeanors and Miſcarriages
 “ others are guilty of, by their falſe Suggeſtions
 “ may not be imputed to me. Let the testimony
 “ of a clear Conſcience, entirely, in all reſpects,
 “ excuſe me. You are not ignorant, that Princes
 “ ſervants are oftentimes too much ſet upon their
 “ own private advantage ; that the truth is fre-
 “ quently concealed from Princes, and they can-
 “ not themſelves look narrowly into all things,
 “ upon whoſe ſhoulders lieth continually the heavy
 “ weight of the greateſt and moſt important af-
 “ fairs.”

Theſe are the Miniſters of the Crown, and of theſe only, the people are to think when they complain. It is an old ſaying, but the proof of it is no novelty, nor are the examples of it likely ever to be ſcarce, *Nemo imperium flagitio quæ ſitum bonis artibus exercuit.* Men are too fond of Power, and Miniſters truſt too much to it, however they got it into their hands, to be over ſcrupulous about the means of preſerving it, when theſe are dictated by the neceſſity of the Conditions on
 which

which it is held. Evil devices to cure blunders, are generally the child of the same imbecillity that committed them. When Governors, who cannot conduct themselves, want extraordinary remedies on particular emergencies, they are easily led into scrapes, by consulting the state quacks which such sorts of Ministers imploy; for these poor undertakers are but a kind of horse doctors, who will prescribe very violent physick, without considering whether the constitution can bear the shock it will occasion; some late measures, if I mistake not, are very much of this stamp; and the writings by which they have been defended, to me appear to have the same colour.

Ministerial measures, we know, must not only be supported, but it is understood to be necessary to justify them, however rashly undertaken, and though sincerely repented of in secret, when the consequences are seen. But nothing but pure madness could lead to justify an unconstitutional Act, by laborious endeavours to cram down our throats principles pregnant with the worst of evils, and infinitely more alarming than any single instance of misconduct which they could be used to palliate. It is not by such doctrines as have been broached, whatever pains may have been taken to spread the vehicles which convey them, that the flame which has been raised, is to be quenched. Gentlemen are mistaken, if they think the people a fit subject for such imposition to work upon. Our privileges are not to be written away, the constitution is not to be conquered by one assault. The Acts of Government cannot prevail over the principles of the Constitution; nor will the rights of the people yield to be expedients of any administration. If writers, whose works we have seen, conceived the People of England were such fools as to swallow the poison they have ad-

ministered, their conception will assuredly breed nothing but their own confusion, and the ruin of those in whose service their labours have been employed.

The cry of the Nation is, *Legis præsidium quod iniquitas eripuit restituitis* : And a much better service would have been done to the offenders, as well as to the people whose rights have been injured, by counselling to restore what had been taken away, rather than assisting to defend the injury. It is the second part of true wisdom to mend an error as soon as possible. And upon this subject also, instruction may be had from the same Queen Elizabeth, who knew the weight of the Scepter she swayed, as well as any Prince that ever sat upon the Throne of England, in her speech to the Commons already alluded to, “ I owe you my
 “ hearty thanks and commendations for your singular good will towards me ; not only in your
 “ hearts and thoughts, but which you have openly expressed and declared, whereby you have
 “ recalled me from an error proceeding from my
 “ ignorance, not my will — These things had undeservedly turned to my disgrace, to whom nothing is more dear than the safety and love of
 “ my People.—The splendor of regal Majesty hath not so blinded mine eyes, that licentious
 “ power should prevail with me more than justice.—The glory of the name of a King may
 “ deceive Princes that know not how to rule, as gilded pills may deceive a sick patient. But
 “ I am none of those Princes : For I know that the Common-wealth is to be governed for the
 “ good and advantage of those that are committed to me, not of myself to whom it is entrusted ;
 “ and that an account is one day to be given before another judgment seat. I think myself most
 “ happy, that, by God’s assistance, I have hitherto so
 prospe-

“ prosperously governed the Common-wealth in
 “ all respects; and that I have such subjects, as
 “ for their good I would willingly leave both
 “ kingdom and life also.”

Ministers, who at any time despise petitions and complaints of the People, will not also despise the consequences to themselves. It is long since the liberties of England had a sacrifice: But it has been thought by very wisemen, that it does look very like as if judgment would at last begin. The People of England is a beast with many heads, and if once they are angered, they rage like a tumultuous sea. It is to no purpose to complain of their being susceptible of commotion, while causes of discontent are not kept at a distance. There are humours in the political body, as well as in the natural, and if they are not removed but stirred, they will do hurt. The more easily the People are exasperated, the more criminal it is to provoke them, because if they are driven to extremes, it may prove true which has been said in a particular stile of language, that the midwifery of any occasion will serve to produce the prodigious issues of their madness. If the country, as is sometimes alledged, is ready enough to bring forth troubles of itself without sowing, it is very needless to throw the seeds of them into the ground, only to make the harvest more plentiful.

In this nation the reproach of invaded liberty will not be suffered to remain, whatever may be necessary to wipe it away. And if there is a man, or a minister in this country, of whom, in any sense, or in any extent of the words, it can be said, *Vitia, quibus solis gloriatur, sunt evertere imperium, etiam cum imperatoris amicum ageret*, it would be but kind to whisper into his ear, the admonition given to a Roman Governour, to
 incline

incline him to treat the People with goodness and lenity, *Imperaturus es hominibus qui nec totam servitutem pati possunt.* But as for the Liberties of England, they are too firmly established to be easily destroyed. One may venture to prophesy, even in prophetick language, "That in that day, when their enemies lay siege against them, they will prove a burthensome stone, that will cut in pieces all those who are gathered together against them." *Convelli sine exitio convellentium non possunt.*

Such are the reflections of one, no matter who, if he is but a sincere Lover of his Country. Whatever weight is in them, is derived from the subject; for nothing could be said to add to the weight of it. I did not follow the example of the two Authors, whose treatises I undertook to consider, by prefacing this Dissertation with a vindication of my Motives; and I shall not add to the length of it, which astonishes myself, by explaining them. These, in all cases, are best to be gathered from the tenor of Writings themselves: And they are of mighty little concern to the Publick, and of still less importance to the matter that has been handled. Thus much I shall only say, that if the subject had not made a strong impression upon my own mind, I hardly think any thing else could have prevailed upon me to have entered into such a discussion of it. And I am not conscious of being too apt to embrace opinions without reason; or of being so ductile, as to submit to influence, which either supercedes or renders it very convenient to stifle those that are real. Whether what has been said, has come from conviction or no, shall be left to be decided by the matter itself, and the manner in which it has been treated.

I have endeavoured to treat the Subject in such a manner, as I thought, became the dignity and the

the gravity of it. I do not think I have writ in the Stile or Temper of Party : I had no temptation nor invitation, no call nor obligation to do it : And to avoid it, I passed over those parts of the two Performances I have had under my eye, which were pointed to any particular quarter or object, of a tendency to excite heat or ill-humour, of which there are not wanting in them both.

The subject itself is sufficient to make a very cool man warm ; and on the side of it, which gains my affections, the most moderate man may be earnest, and despise the imputation of being a Partizan.

A wise man will first covet his own approbation. Faction, fire-brands, and incendiaries, every good man will detest : And if he admires, it cannot be because he is in love with, Time-servers and Weather-cocks, who can change Opinions with the same facility that they shift Sides ; one day the tools of Tyranny, and the next, inrolled among the Friends of Liberty, as their interest, their ambition, their resentments, prospects or pursuits, drive or direct. An honest man, no Party will ever make say what he does not think, or advance what he would either be ashamed to avow, or afraid to justify : Nor will any Connection or Attachment seduce him to act inconsistently with himself. But, inconsistent with his own safety, as well as duty, does every man in this Country act, who behaves otherwise than as a warm friend of the Revolution settlement of the Crown, and a zealous supporter of the Liberties of these Kingdoms, of which that is the grand security.

In defence of the Constitution has been lent the feeble aid of the Considerations contained in these sheets. To fight for the Constitution, is a contest, in which it is no victory to overcome. *Cruentam atque luctuosam victoriam hostibus relinquimus.—Pro patria,*

patria, pro libertate certamus. In the Cause of Liberty, and to those who enjoy it, any one of the People may speak, as every one of them must share either in the prejudice or advantage of any measure that is taken, so far as it affects the Commonwealth in general.—*Nunquam verba feci pro vobis sollicitior*—*neque facundium exercui libertatem Populi armis non adfirmavi*—*sed quia verba apud vos plurimum valent, statui pauca differere ; quæ profligato bello utilius sit vobis audisse quam nobis dixisse.*

To the People of this great Country, I have only further to present, as a Model, the example and the Exhortation of an antient Briton, in a Speech made about 1700 years ago, with which he encouraged his Countrymen to repel the Roman yoke ; and which the Roman Historian, feeling it's Energy and Power, has transmitted, to the Honour of him who made it ; “ Let us,” said he, “ act as Men that hold their Liberty as well as “ their Glory dear,” adding, as I shall conclude, **BRITANNI AGNOSCENT SUAM CAUSAM.**

F I N I S.



